(1)

Supreme Court, U.S.
FILED

021090 JAN 21 2003

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JESUS A. CASTILLO, JR.,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

PAUL JOHN CAMBRIA, JR., ESQ.
Counsel of Record
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333

Counsel for Petitioner

Of Counsel:
ROGER WALTER WILCOX, JR., ESQ.

11 Centre Park
Rochester, New York 14614
(585) 232-6920

(B-2218)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

26 pp

QUESTIONS PRESENTED

1. Does the sufficiency of the evidence review standard generally employed by the State of Texas in criminal cases offend the First and Fourteenth Amendments of the United States Constitution when applied on review of an obscenity conviction?

2. Did the State of Texas prove by legally sufficient evidence that Petitioner knew the content and character of the charged comic book?

3. Can Petitioner's conviction be sustained where the State of Texas failed to introduce the whole of the charged comic book work?

4. Is the charged comic book constitutionally obscene upon independent judicial review?

PARTIES TO THE PROCEEDING

Jesus A. Castillo, Jr.,

Petitioner,

The State of Texas,

Respondent.

PARENT AND SUBSIDIARY COMPANIES

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

PARENT AND SUBSIDIARY COMPANIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

POINT I

THE SUFFICIENCY OF THE EVIDENCE REVIEW STANDARD GENERALLY EMPLOYED BY THE STATE OF TEXAS IN CRIMINAL CASES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN APPLIED ON REVIEW OF AN OBSCENITY CONVICTION 8

POINT II

THE STATE OF TEXAS DID NOT PROVE BY LEGALLY SUFFICIENT EVIDENCE THAT PETITIONER KNEW THE CONTENT AND CHARACTER OF THE CHARGED COMIC BOOK 12

POINT III

PETITIONER'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE BECAUSE THE STATE OF TEXAS DID NOT INTRODUCE THE WHOLE OF THE CHARGED COMIC BOOK 15

POINT IV

THE CHARGED COMIC BOOK IS NOT CONSTITUTIONALLY OBSCENE 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978) 11

Carroll v. State, 701 S.W.2d 913 (Tex. Crim. App. 1986) 14

Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 714 (2001) 12

Glass v. State, 761 S.W.2d 806 (Tex. App. - Houston 1988) 14

Hamling v. United States, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910 (1974) 12

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 12

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) 12

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964) 9, 17

Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 (1974) 10

Kois v. Wisconsin, 408 U.S. 229, 231-32, 92 S.Ct. 2245, 2246-47 (1972) 16, 18

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973) ... 13, 15, 17

Noto v. United States, 367 U.S.290, 81 S.Ct. 1517 (1961) 11

R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992) ... 9

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510 (1995) 9

Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469 (1961) 11

Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959) 12

Staten v. State, 686 S.W.2d 268 (Tex. App.-Houston 1985) 14

Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545 (1989) 8

Statutes

Title 28 United States Code, Section 1257 1

Texas Penal Code Ann. Section 43.23(c)(1) 13

Texas Penal Code Ann. Section 43.21(a)(1) 3, 15, 16

Texas Penal Code Ann Section 43.23 ..... 2, 15, 16

United States Constitution, First Amendment 1

United States Constitution, Fifth Amendment 1

United States Constitution, Amendment XIV, Section 1 2

OPINIONS AND ORDERS BELOW

Jesus A. Castillo, Jr. v. State of Texas, 79 S.W.3d 817 (Tex. App.-Dallas 2002, pet. ref'd)

JURISDICTION OF THIS COURT

The order of the Texas Court of Criminal Appeals refusing the petition for discretionary review was issued October 23, 2002. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257 and Rule 13 of the Rules of this Court as a final judgment entered by a state court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

Texas Penal Code Ann., Section 43.23

> (a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.
>
> (b) An offense under Subsection (a) is a state jail felony.
>
> (c) A person commits an offense, if knowing its content and character, he:
>
> (1) promotes or possesses with intent to promote any obscene material or obscene device; or
>
> (2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.
>
> (d) An offense under Subsection (c) is a Class A misdemeanor.
>
> (e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of

his business is presumed to do so with knowledge of its content and character.

(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

(g) It is an affirmative defense to prosecution under this section that the person who possesses or promotes material or a device proscribed by this section does so for a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose.

Texas Penal Code Ann., Section 43.21(a)(1)

(a) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

STATEMENT OF THE CASE

By information dated September 30, 1999, petitioner was charged with the misdemeanor offense of obscenity (Texas Penal Code Ann. Section 43.23[c]) for selling a comic book entitled "Demon Beast Invasion, the Fallen" on September 22, 1999 [C.R. at 6][1]. By motion filed April 26, 2000, petitioner moved in the Dallas County Criminal Court No. 8 for a determination that the comic book was not obscene [C.R. at 9-10]. Said motion was denied by the Honorable Vickers L. Cunningham, Sr., by order dated August 21, 2000 [C.R. at 11]. Petitioner thereafter pleaded not guilty to the charge of obscenity, and a jury trial commenced on August 21, 2000.

Located on East Mockingbird Lane in the City of Dallas, Keith's Comics primarily offered popular and non-sexual comic books, such as Batman, Superman, etc., and mainstream fantasy paraphernalia, such as figurines of action figures and comic book characters, to the general public [R.R. at 32-35]. On September 22, 1999, Dallas Police Detective Craig A. Reynerson visited Keith's Comics "to see if there was any obscenity being sold in the store" [R.R. at 31-33]. He proceeded to the back of the store into an area marked off by a sign which read "No One Under 18 Allowed Past This Point" [R.R. at 33-34, 48]. Certain comic books Detective Reynerson considered adult in nature were displayed on three shelves and he picked out a comic book entitled "Demon Beast Invasion, the Fallen." The cover contained what *appeared to be* a drawing of an unclad female, but did not display female genitals or breasts and did not depict any sexual conduct [R.R. at 34-35, 48;

---

[1] Unless otherwise noted, numerical references in brackets are to either the Clerk's Record ("C.R.") or the Reporter's Record ("R.R.") used in the State court proceedings.

State's Exhibit 1]. The cover also stated "Absolutely Not For Children," but did not contain any sexually-oriented references [R.R. at 36; State's Exhibit 1]. Detective Reynerson took "Demon Beast Invasion" to the cash register and handed it, front cover up, to petitioner, who charged him $3.19 and placed the comic book in a bag [R.R. at 37-38].

Petitioner explained that, as a manager at Keith's Comics for approximately three years, he sold comic books mostly to adults. While the store carried comic books with violent and mature themes, such items were offered for sale only in a small section in the back of the store clearly marked off limits to children [R.R. at 134-136]. Petitioner recalled Detective Reynerson entering Keith's Comics and proceeding directly to the back of the store. Detective Reynerson asked specifically for "Demon Beast" and petitioner replied that he believed the store had sold out of that title [R.R. at 137]. A few minutes later, the detective approached Petitioner with a comic book. Petitioner saw the title "Demon Beast" on the cover, but did not open the book up to look inside. He also did not see anything on the cover indicating that the comic book contained sexual content and did not know what the book contained until it was produced in court during the trial [R.R. at 137-139]. While Petitioner understood that some comic books in the adult section carried a warning stating "not for children" and contained sexually explicit material, that warning was not exclusive to titles containing sexually oriented content and also applied to comic books with violent, but not sexual, themes [R.R. at 140-141].

Petitioner also presented compelling testimony concerning the literary and artistic significance of "Demon Beast Invasion, the Fallen," and highlighted its integral relationship with the three other volumes of the series of which it was a part. For instance, comic book expert Scott McCloud explained that the four volumes of the series are a thematic whole containing popular Japanese horror and science fiction themes dealing with the concept of an alien infiltration of earth culture and the conflicts it poses for personal

relationships [R.R. at 76-78]. Additionally, Professor Susan Napier described how the series tracked the development of a love relationship between two characters defending the earth against the alien invasion [R.R. at 98-118]. She noted that "Demon Beast Invasion, the Fallen" reflects a Japanese cultural fascination with metamorphosis and strange, bizarre creatures extending back to the fifteenth century, as well as an apocalyptic theme prevalent in this genre in Japan [R.R. at 102-103]. Further, in Professor Napier's opinion, the comic book contained "extraordinary scenes that are really quite beautifully drawn," substantiating the serious artistic value of the work [R.R. at 114-116]. Finally, Professor Napier explained that the comic book had political value insofar as it addressed issues of powerlessness [R.R. at 114-116].

Licensed private investigator Michael Christopher testified concerning the availability of comparable materials in Dallas County. During the weeks prior to trial, Christopher visited a number of stores in Dallas County and bought adult magazines. A Penthouse magazine bought at a "Park-It Market" less than a mile from Keith's Comics showed actual penetration of a vagina by a penis. The issue also contained oral sex, ejaculation and depictions of two women having sex with a grasshopper. Christopher testified that Penthouse is available at numerous places in Dallas County [R.R. at 119-122; Defense Exhibit 2].

At "Priscilla's," a boutique offering sex toys, videotapes and sexy clothing, Christopher purchased three magazines: (1) "Derriere" (which depicted intercourse between men and women involving actual penetration, anal sex and women performing oral sex on each other); (2) "Nugget" (a bondage magazine showing various sex acts involving males and females); and (3) a magazine depicting women in various sexual poses, fondling themselves and using sex toys [R.R. at 123-126; Defense Exhibits 3, 4 and 5]. Finally, Christopher visited an adult bookstore approximately one mile from the courthouse. There, he purchased a magazine entitled "Bitches and Snatches," which focused on

bondage and lesbian activity [R.R. at 128; Defense Exhibit 6].

As a private investigator, Christopher had spent a year and a half to two years gathering sexually explicit materials for attorneys. Based on this experience, Christopher concluded that such materials are prevalent in the State of Texas and are acceptable in Texas [R.R. at 129].

The jury rendered a verdict of guilty [Reporter's Record (hereinafter "R.R.") at 168] and on August 28, 2000, petitioner was sentenced by the Court to 180 days confinement in the Dallas County jail, one year probation and a $4,000 fine [C.R. at 38-39]. Petitioner's motion for a new trial was denied by the County Court [C.R. at 40].

The Court of Appeals for the Fifth District of Texas, at Dallas, affirmed petitioner's conviction, with a dissent by the Honorable Tom James [A-3-16][2]. In an opinion by Justice Molly Francis joined by Justice Fitzgerald, the Court of Appeals rejected eight points of error raised by petitioner. Justice James, writing in dissent, would have reversed petitioner's conviction on the ground that he did not "find in the record sufficient evidence appellant had knowledge of the sexually explicit character and context of the offending comic book to overcome the presumption of appellant's innocent. . ." [A-18].

Petitioner filed a petition for discretionary review by the Texas Court of Criminal Appeals on August 1, 2002 [A-140-166]. By order dated October 23, 2002, the Court of Criminal Appeals denied the petition for discretionary review [A-1]. This petition for a writ of certiorari now follows.

---

[2] Bracketed numerical references preceded by the letter "A" refer to pages of the Appendix submitted with this Petition.

POINT I

THE SUFFICIENCY OF THE EVIDENCE REVIEW STANDARD GENERALLY EMPLOYED BY THE STATE OF TEXAS IN CRIMINAL CASES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN APPLIED ON REVIEW OF AN OBSCENITY CONVICTION

Petitioner's First and Fourteenth Amendment rights were violated when, on appellate review of his conviction of obscenity, the state court expanded its legal sufficiency review to include facts not adduced on the State's case, thereby relieving the State of its failure to prove that the charged comic book is outside the ambit of First Amendment protection. While legal sufficiency review in criminal cases where First Amendment rights are not implicated may properly encompass evidence adduced on the defense case, when an accused is put to a defense of his right to speak, the Constitution requires that the prosecution itself shoulder the burden of presenting a *prima facie* case as to each element of the crime. Consequently, appellate review of the sufficiency of the evidence supporting an obscenity conviction must focus on whether the State met its obligation of proving that the challenged work is beyond constitutional protection, without reference to defense evidence that might cure a gap in the prosecution's case. To hold otherwise would chill an accused's defense of his expressive rights and permit interference with those rights even when the State does not, in the first instance, possess sufficient proof of obscenity to warrant submission of the case to a jury.

That the First Amendment imposes special burdens on government is not a new concept in the history of this Court's jurisprudence. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414,

109 S.Ct. 2533, 2545 (1989); see also, R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542 (1992) (citations omitted) ["The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed"]; Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 2516 (1995) ["It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"].

Accordingly, where government is permitted to regulate expression on the basis of content, this Court has not abjured application of the strictest protections to ensure that regulation does not take form as suppression. Indeed, the Court has not been dissuaded from supporting the bulwark of First Amendment protection even when it adds to the Court's own judicial burdens, as it expressly recognized in Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964). Rejecting the suggestion that a jury's verdict on a charge of obscenity is all but conclusive, the Court explained that expression is entitled to a greater degree of scrutiny before being excluded from the protection of the First Amendment's umbrella:

> The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no "substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

Id. at 187-88, 84 S.Ct. at 1678 (citations omitted). See also, Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 (1974) [rejecting the contention that a jury's resolution of the obscenity *vel non* of the film "Carnal Knowledge" precluded further review of that determination simply because some evidence supported the jury's findings].

The First and Fourteenth Amendments should place no less a burden on state prosecutors seeking to overcome the presumption that an expressive work is constitutionally protected. As petitioner argued below in both the Court of Appeals for the Fifth District of Texas and the Texas Court of Criminal Appeals, when an accused faces a penal sanction for disseminating presumptively protected *speech*, as opposed to engaging in unprotected, non-expressive *conduct*, the State should be held strictly to the burden of proving, on its own case, that the speech at issue is beyond the protection of the First Amendment [A 123-27, 153-57]. The Court of Appeals for the Fifth District, however, rejected this contention and found that petitioner knew of the content and character of the comic book he sold, despite the fact that the State had offered only the cover of the comic book as evidence thereof. Indeed, the court acknowledged the truth of petitioner's assertions that the comic book's cover did not depict actual sexual conduct or even graphic nudity, that the title was not vulgar or sexually explicit, and that the comic book was sold in an establishment that did not retail predominantly sexually explicit materials, but relied on petitioner's testimony in his own defense that he knew that the comic book was shelved in the adults-only section and that said section of the store contained sexually explicit material [A-8-9].

Petitioner submits that this was constitutional error, especially in light of Justice James' dissenting opinion urging reversal: "With my conclusion that the cover conveyed no notice of its sexually explicit content, I would conclude the evidence falls far short of overcoming the constitutional and statutory presumption of innocence and proving beyond a reasonable doubt the requisite criminal scienter" [A-22; citations omitted]. Despite Justice James' concern

that the evidence of petitioner's knowledge of content and character was so weak as to render his conviction manifestly unjust [A-18], the unduly lenient legal sufficiency review standard employed by the majority of the Court of Appeals essentially gave the State a bye on that element of the obscenity.

Having been put in jeopardy by the State on the basis of the content of the charged material, an accused should remain free to defend his exercise of First Amendment rights without fear of curing a deficiency in the State's case through the presentation of defense evidence. Any other standard of review will promote a chilling effect on the vigorous defense of presumably protected speech. Moreover, if the State's case is "so lacking that it should not have even been submitted to the jury," Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141 (1978), the First Amendment minimally requires that the State not be relieved of its burden to prove that the challenged work is outside the ambit of constitutional protection by permitting an obscenity conviction to be affirmed on the basis of a legal sufficiency review considering evidence offered by an accused in defense of his expressive rights after the erroneous denial of a motion for an instructed verdict.

Indeed, enhanced protection of First Amendment rights in the context of a criminal prosecution has been explicitly recognized by this Court in the context of *strictissimi juris* sufficiency of the evidence review. See, Noto v. United States, 367 U.S.290, 81 S.Ct. 1517 (1961) [where the Court advised that in a membership conspiracy case, an appellate court must determine not just that there was proof that the defendant belonged to an organization that used both legal and illegal means to accomplish its goals, but also that the proof established that the defendant shared the criminal intent of the conspirators]; see also, Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469 (1961). The government should similarly be held to a strict, non-transferable burden of proof as to every element of the crime of obscenity.

Accordingly, petitioner respectfully requests that this Court grant his petition for a writ of certiorari to the Texas Court of Criminal Appeals for the purpose of requiring that the state courts utilize the proper standard when reviewing the legal sufficiency of the evidence supporting his conviction of obscenity.

POINT II

THE STATE OF TEXAS DID NOT PROVE BY LEGALLY SUFFICIENT EVIDENCE THAT PETITIONER KNEW THE CONTENT AND CHARACTER OF THE CHARGED COMIC BOOK HE SOLD

The Due Process Clause of the Fourteenth Amendment "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 714 (2001); see also, In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). Consequently, the Constitution requires that state court criminal convictions be supported by evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

In this regard, an important element of any obscenity case is the State's obligation to prove beyond a reasonable doubt that the accused knew the content and character of the material alleged to be obscene. Hamling v. United States, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910 (1974) ["It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials"]; see also, Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959) [rejecting a bookseller's *per se* liability for the sale of an obscene work].

In the instant case, trial counsel moved for an instructed verdict on the ground that the State had not presented legally

sufficient evidence that petitioner knew the content and character of "Demon Beast Invasion, the Fallen" when he sold the comic book to the Dallas police detective [R.R. at 60-61]. The motion was denied and petitioner's appellate challenges to the sufficiency of the evidence supporting this element were rejected [A-1, 8-9]. This was error of a constitutional magnitude.

As described above, petitioner worked in a comic book store that retailed predominantly non-adult, mainstream comics and action hero figurines [R.R. at 32-35]. The store had a small area in which no one under the age of eighteen was allowed and from this area Detective Reynerson obtained a copy of "Demon Beast Invasion, the Fallen." Though the cover of this comic book warns that it is not for children, it does not depict actual nudity. The artistic rendering of the female on the cover does not depict uncovered female breasts or genitalia, or sexual conduct [see R.R. at 32-35; State's Exhibit 1], and the title of the work certainly does not suggest any sexual theme. Detective Reynerson handed the comic book face up to petitioner when he purchased it [R.R. at 37-38]. This is the sum of the proof offered on the State's case to establish petitioner's knowledge of the content and character of the charged materials.

Nothing in the record establishes that petitioner had any reason to believe that "Demon Beast Invasion, the Fallen" contained hardcore content of the type intended to be regulated by Texas Penal Code Ann. Section 43.23(c)(1). See also, Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973). Petitioner sold Detective Reynerson a comic book with none of the hallmarks of a sexually explicit magazine apparent on its cover and in a retail context quite unlike the obviously adult bookstores where hardcore materials are most often sold. Moreover, even if one considers petitioner's own testimony that he knew the comic book was shelved in the small adults-only section of the store, it is apparent from the trial proof that violent comics were also kept in that section. In fact, "Demon Beast Invasion, the Fallen" as a title is not

sexually explicit in any way and suggests violent, but not sexual, content.

The dearth of proof that petitioner was aware of the content and character of the comic book at issue stands in stark contrast to the several Texas cases cited by petitioner below in which the defendant's scienter was essentially an unavoidable conclusion in light of circumstances strongly indicative of his awareness of the graphic sexual content of the majority of the inventory made available to the public. For example, in Staten v. State, 686 S.W.2d 268 (Tex. App.-Houston 1985), not only did the cover of the magazine in dispute contain "highly explicit photographs of sex acts between a man and a woman" portraying actual sexual relations, but the store was clearly an adult bookstore which did not retail any "regular" magazines such as Time or Newsweek, and which carried as its inventory only sexually explicit magazines similar to the one charged and sexual devices which were displayed for sale. Id. at 270. Similarly, in Carroll v. State, 701 S.W.2d 913 (Tex. Crim. App. 1986), defendant's conviction was affirmed upon evidence that he worked in an adult bookstore that purveyed apparently obscene devices and magazines whose covers depicted ultimate sexual acts. Id. at 915. The store exhibited numerous signs containing the words "Hard Core" and numerous sexually explicit movie stills labeled "Dirty Movies." Direct testimony was also offered that the defendant in that case himself unpacked the graphic magazines, placed them in a plastic cellophane wrapper and heat-sealed the magazines before placing them on the shelves. Id.; see also, Glass v. State, 761 S.W.2d 806 (Tex. App. - Houston 1988) [where knowledge of content and character was shown by the State's proof that, in addition to a magazine cover containing depictions of sexual intercourse, the defendant worked in an adult bookstore named "Hot X Adult Theatre"; the bookstore contained "rows and rows" of adult magazines along each wall and the magazine selected for prosecution had a sexually explicit title].

No such circumstances existed in the case at bar. Petitioner did not work in an adult bookstore and did not retail predominantly sexually explicit materials. No sexual devices were displayed; only comic books and action hero figurines. The cover of the subject work did not show any graphic sexual content, and the title suggests a non-sexual, horror/science fiction theme. On these facts, petitioner could not have known of the content and character of the comic book, as recognized by Justice James in his dissent [A-18-22]. Accordingly, petitioner's conviction should be reversed due to legally insufficient evidence that he knew the content and character of "Demon Beast Invasion, the Fallen."

POINT III

PETITIONER'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE BECAUSE THE STATE OF TEXAS DID NOT INTRODUCE THE WHOLE OF THE CHARGED COMIC BOOK

Texas Penal Code Ann. §§ 43.21(a)(1) and 43.23 require the trier of fact to consider "the whole of the material" in determining whether the prosecuted work appeals to the prurient interest and lacks serious literary, artistic, political or scientific value. See also, Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973). Here, Petitioner contended on appeal that the State's failure to present the other three volumes of "Demon Beast Invasion, the Fallen" rendered the evidence supporting his conviction legally insufficient [A-54-56, 127-30]. The Court of Appeals rejected this argument, explaining that "[t]he other volumes were not necessary or relevant to the obscenity issue" [A-11-12]. Discretionary review of this challenge was also refused [A-1, 160-62].

The trial proof demonstrated that the charged comic book is only the second volume of a four-volume series [R.R. at 75-76]. Comic book expert Scott McCloud testified that Volumes 1 through

4 are thematically linked and that the sexual themes set forth in Volume 2 do not stand alone, but are intended to be juxtaposed against the normal, healthy relationships found at the beginning of Volume 1 for the purpose of showing ways in which certain characters have been changed by the alien invasion which is the subject of the series [R.R. at 83-90]. McCloud's testimony was corroborated by Professor Susan Napier, who described the continuing themes of the series in detail and agreed that "Demon Beast Invasion, the Fallen," Volume 2, should be evaluated in the context of the entire series [R.R. at 98-118].

Having considered only one volume of a four-volume work, the jury cannot be said to have evaluated "the whole of the material." Texas Penal Code Ann. §§ 43.21(a)(1) and 43.23. This Court has made clear that the appropriate focus is on the thematic content and relationships within the work . See, Kois v. Wisconsin, 408 U.S. 229, 231-32, 92 S.Ct. 2245, 2246-47 (1972) ["In this case, considering the poem's content and its placement amid a selection of poems in the interior of a newspaper, we believe it bears some of the earmarks of an attempt at serious art"]. Since such content and relationship in this case span a four-volume series, the prosecution should have been required to present all four volumes for the jury's consideration.

"Demon Beast Invasion, the Fallen" was integrally related to the storyline and thematic content of the entire four-volume series and the jury should have been permitted to evaluate the work as a whole before rendering judgment on the question of obscenity. Since they were not allowed to do so, petitioner's conviction is not supported by legally sufficient evidence. Accordingly, petitioner respectfully requests that this Court grant his petition for a writ of certiorari to the Texas Court of Criminal Appeals.

POINT IV

THE CHARGED COMIC BOOK IS NOT CONSTITUTIONALLY OBSCENE

This Court is vested with the power to make an independent determination of the obscenity *vel non* of "Demon Beast Invasion, the Fallen.' Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964). Exercise of that authority in the instant case will demonstrate that the subject comic book is not obscene.

Applying the Miller test, the Court of Appeals concluded, on independent review, that "Demon Beast Invasion, the Fallen" is constitutionally obscene. In particular, the Court found that, "[t]hese drawings and comments are patently offensive and neither advocate nor communicate any ideas or opinions concerning serious literary, artistic, political, or scientific values" [A-13; (citation omitted)]. This determination cannot be sustained.

At trial, Petitioner presented compelling testimony concerning the literary and artistic significance of "Demon Beast Invasion, the Fallen." For instance, comic book expert Scott McCloud explained that the four volumes of the series are a thematic whole containing popular Japanese horror and science fiction themes dealing with the concept of an alien infiltration of earth culture and the conflicts it poses for personal relationships [R.R. at 76-78]. Additionally, Professor Napier described how the series tracked the development of a love relationship between two characters defending the earth against the alien invasion [R.R. at 98-118]. She noted that "Demon Beast Invasion, the Fallen" reflects a Japanese cultural fascination with metamorphosis and strange, bizarre creatures extending back to the fifteenth century, as well as an apocalyptic theme prevalent in this genre in Japan [R.R. at 102-103]. Further, in Professor Napier's opinion, the comic book contained "extraordinary scenes that are really quite beautifully drawn," substantiating the serious artistic value of the work [R.R. at

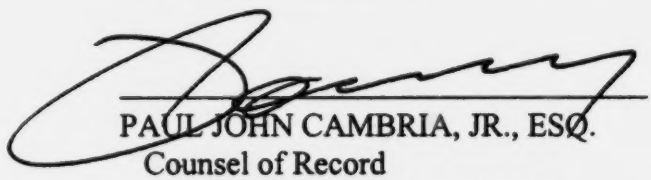
114-116]. Finally, Professor Napier explained that the comic book had political value insofar as it addressed issues of powerlessness [R.R. at 114-116].

In light of the foregoing, it is quite apparent that "Demon Beast Invasion, the Fallen" communicates ideas and opinions concerning issues of serious literary, artistic, political and scientific value. See, Kois v. Wisconsin, supra. The work's presentation of skillful, creative artwork and bona fide literary and historical themes are readily distinguishable from the base explicit photographic portrayals of actual sexual conduct often confronted by this Court, and readily available within Dallas County and the State of Texas [R.R. at 119-29; Defense Exhibits 2-6]. Consequently, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari to consider the obscenity vel non of "Demon Beast Invasion, the Fallen."

CONCLUSION

Petitioner respectfully submits that this Court should grant his petition for a writ of certiorari for the purpose of reviewing and reversing his conviction of obscenity because the Texas appellate courts employed an erroneous standard of review, the State failed to prove that petitioner knew the content and character of the comic book at issue, the State failed to introduce the whole of the work into evidence as required, and, on independent review by this Court, "Demon Beast Invasion, the Fallen" is not constitutionally obscene.

Respectfully submitted,



PAUL JOHN CAMBRIA, JR., ESQ.
Counsel of Record
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333

Of Counsel:
ROGER WALTER WILCOX, JR.

Supreme Court, U.S.
FILED
JAN 21 2003
OFFICE OF THE CLERK

(2)

021090

No. _____

In The

Supreme Court of the United States

JESUS A. CASTILLO, JR.,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court of Criminal Appeals of Texas

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PAUL JOHN CAMBRIA, JR., ESQ.
Counsel of Record
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333

Counsel for Petitioner

Of Counsel:
ROGER WALTER WILCOX, JR., ESQ.

11 Centre Park
Rochester, New York 14614
(585) 232-6920

(B-2219)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

167 pp

TABLE OF CONTENTS

Page

Order of Court of Criminal Appeals of Texas Refusing Appellant's Petition for Discretionary Review. A-1

Judgment, Opinion and Dissenting Opinion of Court of Appeals for the Fifth District of Texas at Dallas A-2

Certificate of Conviction A-23

Brief for the Appellant A-27

State's Brief A-76

Reply Brief for the Appellant A-117

Petition for Discretionary Review A-140

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

October 23, 2002
COA#: 05-00-01522-CR
RE: Case No. 1404-02
STYLE: CASTILLO, JESUS A., JR.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

PAUL J CAMBRIA
42 DELAWARE AVENUE STE 300
BUFFALO NY 14202

COURT OF APPEALS
Fifth District of Texas at Dallas

JUDGMENT

JESUS A. CASTILLO, JR., Appellant

No. 05-00-01522-CR V.

THE STATE OF TEXAS, Appellee

Appeal from the County Criminal Court No. 8 of Dallas County, Texas. (Tr.Ct.No. MA99-72739-J). Opinion delivered by Justice Francis, Justices James and Fitzgerald participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

MOLLY FRANCIS
JUSTICE

File: 001522F - From documents transmitted: 07/02/2002
AFFIRMED; Opinion Filed July 2, 2002

In The
Court of Appeals
Fifth District of Texas at Dallas

.....

No. 05-00-01522-CR

.....

JESUS A. CASTILLO, JR., Appellant
V.
THE STATE OF TEXAS, Appellee

.....

On Appeal from the County Criminal Court No. 8
Dallas County, Texas
Trial Court Cause No. MA99-72739-J

.....

OPINION

Before Justices James, Fitzgerald, and Francis
Opinion By Justice Francis

A jury convicted Jesus A. Castillo, Jr. of misdemeanor obscenity for selling a sexually explicit comic book to an undercover Dallas police officer. In eight points of error, appellant complains (1) the evidence is legally and factually insufficient to support his conviction, (2) the comic book is not "constitutionally obscene," (3) the trial court erred in admitting certain evidence, and (4) he was denied his due process rights by the court reporter's failure to record the punishment hearing. For the reasons set out below, we overrule all points of error and affirm the trial court's judgment.

Appellant was manager at Keith's Comics, a bookstore located on Mockingbird Lane in a neighborhood of residences, businesses, and an elementary school. Responding to a citizen complaint, Craig

Reynerson, an undercover detective with the vice squad of the Dallas Police Department, went to Keith's Comics "[t]o see if there was any obscenity being sold in the store." Reynerson said the store had numerous shelves and a couple of display cases with "action fantasy" comic books, such as "Superman" and "Batman," and "action figure-type figurines." About three shelves in the back of the store, however, contained violent and sexually explicit comic books. Although this area was not separated by a doorway, a sign was displayed at the entrance stating, "No One Under 18 Allowed Past This Point." From this area Reynerson selected a comic book, "Demon Beast Invasion, The Fallen." Reynerson made this selection because the front cover depicted what "appear[ed] to be a nude female" and contained a warning label, "Absolutely Not For Children." According to Reynerson, all the comic books with that label contained sexually explicit depictions.

Reynerson took the comic book to the counter, handed it to appellant with the front cover showing, and paid for it. Appellant placed the comic book in a bag, and Reynerson left. He took the comic book to his office and reviewed it. Reynerson said the comic book depicted genitals in a state of arousal and contained acts of sodomy, masturbation, excretory functions, sadism, and masochism. Reynerson described one scene in which a demon, transformed into a tree, penetrated a female with its roots. After reviewing the book and comparing it to other materials, he concluded the book was obscene. Reynerson did not know the book was the second in a four-part series. However, he purchased the book individually and did not remember seeing any of the other volumes. After Reynerson's testimony, the State rested its case.

Appellant testified he had been manager at Keith's Comics for three years. The store included a section containing violent and mature theme comic books; children were not allowed in that area. Appellant remembered selling "Demon Beast Invasion" to Reynerson. He testified that Reynerson came into the store and went straight to the "over 18" section. After about five minutes, appellant asked Reynerson if he needed help, and Reynerson specifically asked for the comic book at issue here. Appellant told Reynerson

that he thought the store was sold out of the book because it was a couple of years old. Appellant asked Reynerson if he wanted to put the book on a request list, and Reynerson declined. Appellant then returned to the front of the store. About five minutes later, Reynerson came to the counter with "Demon Beast Invasion" and handed it to appellant. Appellant rang up the sale and put the comic book in a bag. He remembered "seeing the cover" but denied seeing "the woman on the cover" or "any blurbs saying that it had adult content." When asked if he had ever seen the book prior to selling it to Reynerson, appellant replied, "I saw it in '98. I have a good memory of these things." However, he said he did not look through the book and the first time he saw its contents "panel by panel" was at trial.

On cross-examination, appellant acknowledged that he knew exactly which comic book Reynerson was referring to and was familiar with "Demon Beast Invasion" from its cover but "[n]ot from the story content." He acknowledged the comic book was shelved in the adult section and that the books with the warning label were kept in that section because of the sexually explicit nature of their contents. On re-direct, he clarified his answer, saying some of the books may be violent and have no sexual content.

As part of his defense, appellant also called two experts. Scott McCloud, an award-winning author and comic book artist, testified that sixty-eight percent of comic book readers are over the age of eighteen. He explained comic books have diversified over the years to include more general interest fantasy, autobiography, romance, and "very naturalistic fiction." He told the jury that comic books were "huge" in Japan. McCloud had read all four volumes of "Demon Beast Invasion." He described the series as a genre of Japanese horror/science fiction dealing with the alien infiltration of earth culture with themes of love and evil. In McCloud's opinion, although the writer and author struggled in certain areas, the series and volume two specifically have serious literary and artistic merit because of the effort and skill involved in the production. He acknowledged the comic book is "sexually potent in places," although he did not find the series, or volume two, sexually

arousing.

On cross-examination, McCloud admitted the series "push[es] the genre" with its alienation and sexual subject matter. Further, he said volume two "contains probably the most sexual[ly] explicit material" of any of the four and agreed most of the issue "is basically sex." Nevertheless, in his opinion, the sexual scenes should be interpreted in light of volume one, which set out the characters in "healthy, normal relations." When questioned whether he thought the tree scene was "perverted," McCloud replied, "I think it's disturbing . . . to most readers. And it's meant to be."

Susan Napier, an associate professor in Asian studies at the University of Texas at Austin, is a specialist in Japanese literature and culture and has extensively studied "anime" and "manga." Anime is the short word for Japanese animation; manga is a Japanese word for comic books. Like McCloud, Napier had read all four volume of "Demon Beast Invasion" and believed volume two should be interpreted in context with the other three volumes of the series. Napier briefly summarized the contents of each of the volumes and explained the story line deals with love, alien infiltration, and the attempt to overcome the infiltration. According to Napier, Japanese culture is fascinated with metamorphosis, bizarre creatures, and the apocalypse, which is what she said the series depicts. Napier testified the narrative, suspense, love story, and "beautifully drawn" scenes gave the series and volume two serious literary and artistic value. Because the story also involved the desire for power, Napier believed the series also had political value.

Finally, Michael Christopher, a licensed private investigator, testified that sexually explicit materials are "prevalent" in North Texas. Christopher went to a number of different stores near Keith's and bought magazines depicting various sexually explicit material. For instance, at a convenience store less than one mile from Keith's, he purchased a Penthouse magazine that had color photographs of men and women performing sex acts and a story of two women having sex with a grasshopper. At a nearby adult boutique, Christopher bought three other magazines that depicted oral sex,

anal sex, sex with multiple partners, and bondage. Christopher testified he has gathered these types of material all over North Texas. When asked if the materials were acceptable in the State of Texas, he replied, "I guess so. They are sold all over the place."

Appellant's first four points of error challenge the legal and factual sufficiency of the evidence to support his conviction. When reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Chambers v. State,* 866 S.W.2d 9, 15 (Tex. Crim. App. 1993). In this review, the trier of fact is the exclusive judge of the weight and credibility given to witness testimony. *See Jones v. State,* 944 S.W.2d 642, 647 (Tex. Crim. App. 1996).

In a factual sufficiency review, we ask "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *King v. State,* 29 S.W.3d 556, 563 (Tex. Crim. App. 2000). We will reverse the fact finder's determination only if a manifest injustice occurred. *Id.* In conducting this analysis, we may disagree with the jury's determination, even if probative evidence supports the verdict, but we must avoid substituting our judgment for that of the fact finder. *See Johnson v. State,* 23 S.W.3d 1, 6 (Tex. Crim. App. 2000).

A person commits an offense if, knowing its content and character, he promotes or possesses with intent to promote any obscene material or obscene device. Tex. Pen. Code Ann. § 43.23 (c)(1) (Vernon 1994). Obscene means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient

interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genitals; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

Tex. Pen. Code Ann. § 43.21(a)(1) (Vernon 1994).

In his first and third points of error, appellant contends the evidence is legally and factually insufficient to establish beyond a reasonable doubt his knowledge of the content and character of the book. Additionally, appellant contends the evidence is factually insufficient to establish the book is patently offensive, appeals to the prurient interest, and lacks serious artistic and literary value.

As a threshold matter, we note that appellant asserts this Court may look *only* to the evidence presented by the State - Detective Reynerson's testimony - in determining the legal sufficiency of the evidence. He argues that because this case involves the "'protected' status of expression," we should not consider the evidence presented by the defense in determining whether the State met its burden. He cites no law for this proposition, and we decline to do so in favor of

the well-established law governing evidentiary sufficiency analysis. *See Cook v. State,* 858 S.W.2d 467, 470 (Tex. Crim. App. 1993) (explaining that court considers evidence presented at trial by both State and defense in determining sufficiency of evidence).

As stated previously, in an obscenity case, the State has the burden of establishing the defendant knew the character and content of the material in question. *See* Tex. Pen. Code Ann. § 43.23; *Burden v. State,* 55 S.W.3d 608, 613 (Tex. Crim. App. 2001); *Carroll v. State,* 701 S.W.2d 913, 914 (Tex. Crim. App. 1986). The State need not prove that the defendant knew the material was obscene; it is enough that the defendant had knowledge of the sexually explicit character and content of the materials. *Burden,* 55 S.W.3d at 514. The State may satisfy this burden with either direct or circumstantial evidence. *Carroll,* 701 S.W.2d at 914.

In arguing the State failed to meet its burden, appellant relies heavily on the fact that Keith's Comics was not an adult bookstore and "did not retail predominantly sexually explicit materials." He argues the comic book's cover did not depict "actual sexual conduct or even graphic nudity," and its title was not vulgar or sexually explicit.

While appellant's assertions are true, the evidence showed that appellant had managed Keith's Comics for two years when he sold the comic book, was familiar with the title, handled the comic book at the time of the sale, knew it was in the store's "adults-only" section, and knew the "adults-only" section contained sexually explicit material. Further, the record reflects the comic book contained a "not for children" warning label, and there was testimony that all the materials in the "adults-only" section contained sexually explicit material. Under these circumstances, we conclude there was legally sufficient circumstantial evidence from which the jury could find appellant had knowledge of the sexually explicit content and character of the comic book. We overrule his first point of error.

In the second point of error, appellant criticizes the "paucity of proof" presented by the State on knowledge and argues the evidence is factually insufficient when considering proof offered to negate

scienter. In particular, he asks this Court to review the photographs of the comic book store, which illustrate the "predominantly non-adult nature of the store and its inventory." He argues that simply because the book was inappropriate for children is "not dispositive of a sexually obscene character" because Keith's offered comic books in the same section with "themes of violence with little or no sexual content" and for which a warning would be appropriate.

While we do not disagree with appellant's characterization of this evidence, we do disagree that the evidence is so weak as to render his conviction manifestly unjust. The fact that Keith's shelved more non-adult than adult inventory is not dispositive in light of the fact the store had a specific adults-only section. As stated previously, appellant managed the book store and had for two years when this offense occurred. He demonstrated his knowledge of adult-themed comic books at the beginning of his direct examination when his attorney asked him about random titles, all with which he was familiar.

Appellant was undisputedly familiar with "Demon Beast Invasion," saw the book in 1998, and had a "good memory of these things." He admitted he knew exactly to which magazine Reynerson referred, said he was familiar with the book from its cover, and knew the book was shelved in the adults-only section. Although he denied seeing "the woman on the cover" or "any blurbs saying that it had adult content" when Reynerson purchased it, appellant's testimony was clear that he previously had seen the cover and knew it was shelved in the adults-only section. Further, appellant knew all the materials in the "adults-only" section were either so sexually explicit or so violent that they precluded access by children. The cover of a nude female certainly suggests this comic book fell into the sexually explicit category. Thus, even if a jury believed appellant had never seen the comic book "panel by panel" until trial, it could still rationally find appellant was aware of its sexually explicit contents. The evidence establishing knowledge of content and character is not so weak as to undermine confidence in the jury's verdict, nor is it greatly outweighed by contrary proof.

We likewise reject appellant's complaint that the evidence is

factually insufficient to prove the comic book lacked serious literary, artistic, scientific, or political value. We recognize that appellant presented two experts to testify as to the literary, artistic, and political value of the comic book; however, the jury also had Reynerson's opinion that the book was obscene because of the sexual content it depicted. In particular, he testified the comic book contained acts of sexual intercourse, oral sodomy, masturbation, excretory functions, sadism, masochism, and lewd exhibition of the genitals. Reynerson testified he looked at the book from front to back and believed the book appealed to the prurient interest in sex. Reynerson did not believe the book had any literary, scientific, artistic, or political value. The jury heard competing opinions and apparently found Reynerson's opinion more compelling. Moreover, the jury had the comic book. The fact that the two defense experts did not find the material to be obscene would not prevent the jury from deciding it (1) lacked serious literary, artistic, scientific, or political value or (2) would be offensive to the average member of the community. *See Beier v. State,* 681 S.W.2d 124, 127 (Tex. App.-Houston [14th Dist.] 1984), *rev'd on other grounds,* 687 S.W.2d 2 (Tex. Crim. App. 1985).

Finally, we reject appellant's argument that the book is not patently offensive when considered in light of contemporary community standards. In making this argument, appellant relies on the testimony of his private investigator, who presented other magazines purchased near Keith's containing "more graphic" depictions than "Demon Beast Invasion." Assuming all of the books admitted were comparable to the comic book at issue, the fact these books were available does not mean they were not likewise obscene; it could suggest that other persons are engaged in similar activity. *See Burden,* 55 S.W.3d at 616. We conclude the evidence was factually sufficient to establish that (1) appellant knew the sexually explicit content and character of the comic book, (2) the book lacked literary, artistic, scientific, or political value, and (3) was patently offensive. Accordingly, we overrule the third point of error.

In his second and fourth points of error, which he argues jointly, appellant asserts the State's failure to present evidence

concerning the content and character of all four volumes of the "Demon Beast Invasion" series renders the evidence legally and factually insufficient. Appellant points to language in the penal code and case law requiring the issues of prurient interest and artistic and literary value to be considered in light of the material "taken as a whole." *See* Tex. Pen. Code Ann. § 43.21(a); *Miller v. California,* 413 U.S. 15, 24 (1973). He argues defense experts testified that volume two should not be considered independently because the story line developed in volume one and continued throughout the series.

Appellant's argument ignores the fact that volume two was sold as an individual unit, not as part of a series. Therefore, the State only had to prove that volume two, taken as a whole, was obscene. The other volumes were not necessary or relevant to the obscenity issue. In so concluding, we reject any assertion that the State must present all volumes in a series so that the jury can consider the context in determining whether the material is obscene, even when the complained-of volume is sold as a separate, independent unit, as was the case here. Considering the appropriate standards of review, we conclude the State's failure to present the other three volumes did not render the evidence legally or factually insufficient. We overrule the second and fourth points of error.

In his fifth point of error, appellant asserts the book is not "constitutionally obscene." Relying on McCloud's and Napier's testimony, appellant maintains the book warrants First Amendment protection. We disagree. In determining whether material is "constitutionally obscene," appellate courts are obligated to independently review and evaluate the material in accordance with a three-part test set out in *Miller v. California. See Andrews v. State,* 652 S.W.2d 370, 383 (Tex. Crim. App. 1983); *Ho v. State,* 856 S.W.2d 495, 499 (Tex. App.-Houston [1st Dist.] 1993, no pet.). This three-part test requires the court to consider whether: (1) the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest in sex; (2) the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the

work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Andrews,* 652 S.W.2d at 378 (quoting *Miller,* 413 U.S. at 24). Work which does not appeal to the prurient interest, does not depict sexual conduct in a patently offensive way, and does not lack serious literary, artistic, political, or scientific value is constitutionally protected. *See id.* at 384.

Applying this three-part test to "Demon Beast Invasion, The Fallen - Volume 2," we conclude the comic book is not constitutionally protected. The first three pages contain a series of very graphic drawings of women engaging in oral sex and drawings prominently displaying the female genitals. *See* Tex. Pen. Code Ann. § 43.21(a)(1)(B). Over the next several pages, there are also drawings of a man and woman engaging in sexual intercourse and oral sex, and, again, the genitals are prominently displayed in a state of stimulation and arousal. *See id.* Additionally, the book contains sexually explicit comments and drawings explicitly depicting excretory functions and a female engaging in intercourse with a tree root. *See id.* These drawings and comments are patently offensive and neither advocate nor communicate any ideas or opinions concerning serious literary, artistic, political, or scientific values. *See Andrews,* 652 S.W.2d at 384. We conclude the average person, applying contemporary community standards in this State, would find "Demon Beast Invasion, The Fallen - Volume 2," taken as a whole, would only appeal to those who have a prurient interest in sex and therefore is obscene. *Id.* We overrule the fifth point of error.

In his sixth point of error, appellant complains the trial court erred in admitting testimony about the proximity of an elementary school to the comic book store. Appellant filed a motion in limine seeking to preclude the State from "making any sort of reference or allusion to the fact that Keith's Comics . . . is in close proximity to a school." In a pretrial hearing on the motion, the defense argued such evidence was irrelevant and its probative value, if any, was outweighed by its prejudicial effect. The trial court denied the motion in limine. When the evidence was adduced at trial through Reynerson, appellant did not object. It is well-settled that the denial of a motion in limine is not sufficient to preserve error for review,

but rather there must be a proper objection to the proffered evidence. *McDuff v. State*, 939 S.W.2d 607, 618 (Tex. Crim. App. 1997). By failing to object when the evidence was offered at trial, appellant failed to preserve his claim for review. *See id.* We overrule the sixth point of error.

In his seventh point of error, appellant argues the trial court erred in admitting Reynerson's opinion that the comic book was obscene over his objections that Reynerson was "not qualified to give his opinion" on the matter. We have reviewed the record in this case and, after doing so, conclude we need not decide whether the trial judge erred in allowing the testimony because, even if he did, the same evidence was admitted later without objection. The overruling of an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998). This rule applies whether the other evidence was introduced by the defendant or the State. *Id.*

Here, the State asked Reynerson if, in his opinion, the comic book met the "definition of obscenity." Appellant's objection was overruled, and Reynerson replied, "Yes." The following then occurred:

[PROSECUTOR]: And in your opinion are the acts depicted within this comic book patently offensive to the current community standards of decency?

[DEFENSE COUNSEL]: Objection, leading.

[TRIAL COURT]: Sustained.

[PROSECUTOR]: You talked about the Penal Code. What's the first

element in obtaining obscenity on the Penal Code?

[REYNERSON]: If it's patently offensive to the average Texan's community standards, yes.

[PROSECUTOR]: And did you form an opinion as to whether or not this particular comic book would be patently offensively [sic] to the average Texan?

[REYNERSON]: Yes.

[PROSECUTOR]: And what is that opinion?

[REYNERSON]: *That it was obscene, that it was offensive.*

[PROSECUTOR: And why?
[REYNERSON]: Because of the sexual contact depicted in it.

Because the same opinion was elicited only questions later without any objection from appellant, we conclude error, if any, was harmless. *Id.* To the extent appellant complains that Reynerson was allowed to give an opinion on the lack of serious artistic, literary, scientific, or political value, again he cannot be harmed. This opinion goes to an element of the very definition of obscenity. Thus, once Reynerson testified, without objection, that the material was obscene, he necessarily testified it lacked serious literary, artistic,

scientific, or political value. We overrule the seventh point of error.

In his eighth point of error, appellant asserts he is entitled to reversal because the court reporter failed to record the punishment hearing. This failure, he contends, constituted a violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. We disagree.

Prior to trial, appellant elected to have the trial court assess punishment in the event of a conviction by the jury. After the jury returned its guilty verdict, the trial court ordered a presentence investigation and recessed. The trial court ultimately assessed punishment at 180 days in jail, probated for twelve months, and a $4000 fine. The punishment hearing was not recorded. Appellant's trial counsel then filed a timely motion for new trial; the motion, however, did not complain that the punishment hearing was not recorded.

Texas Rule of Appellate Procedure 33.1(a) provides that, to present a complaint for appellate review, the record must show (1) the complaint was presented by timely request, objection, or motion and was sufficiently specific to make the trial judge aware of the complaint and (2) the trial judge either ruled or refused to rule and appellant objected to the refusal. Tex. R. App. P. 33.1(a). An objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule. *Purtell v. State,* 761 S.W.2d 360, 365 (Tex. Crim. App. 1988). Even constitutional error may be waived. *Wright v. State,* 28 S.W.3d 526, 536 (Tex. Crim. App. 2000), *cert. denied,* 531 U.S. 1128 (2001).

Here, appellant has not shown that he alerted the trial judge to the fact that the court reporter was not making a record of the punishment hearing. Moreover, appellant's trial counsel filed a motion for new trial but did not complain that his punishment hearing was not recorded, nor did he complain of any other punishment issue. Under these circumstances, we conclude appellant has waived his complaint. We overrule the eighth point of error.

We affirm the trial court's judgment.

MOLLY FRANCIS
JUSTICE

Publish
Tex. R. App. P. 47

File Date[07/02/2002]
File Name[001522F]
File Locator[07/02/2002-001522F]
Disclaimer on Opinions

File: 001522DF - From documents transmitted: 07/02/2002
Dissenting opinion issued July 2, 2002

S
In The
Court of Appeals
Fifth District of Texas at Dallas

.....

No. 05-00-01522-CR

.....

JESUS A. CASTILLO, JR., Appellant
V.
THE STATE OF TEXAS, Appellee

.....

On Appeal from the County Criminal Court No. 8
Dallas County, Texas
Trial Court Cause No. Trial Court Cause No. MA99-72739-J

.....

DISSENTING OPINION
Before Justices James, FitzGerald, and Francis
Dissenting Opinion By Justice James

I take no issue with the majority's opinion the material is obscene and unprotected by the First Amendment. I also take no issue with the majority's opinion (1) the State's failure to present the content and character of the entire comic book series does not render the evidence legally and factually insufficient; and (2) the evidence is legally sufficient to establish beyond a reasonable doubt appellant's knowledge of the content and character of the book. My disagreement is in the majority's conclusion the evidence of appellant's knowledge of content and character is not so weak as to render appellant's conviction manifestly unjust. Because I do not find in the record sufficient evidence appellant had knowledge of the sexually explicit character and content of the offending comic book to overcome the presumption of appellant's innocence, I respectfully dissent.

In conducting a factual sufficiency review, we must show deference, although not absolute deference, to the fact finder. *Johnson v. State*, 23 S.W.3d 1, 8 (Tex. Crim. App. 2001). The degree of deference must be proportionate with the facts we can glean from the trial record, considering only those few matters bearing on credibility that can be fully determined from the transcribed record before us on appeal. *Id.* Unless the available record clearly reveals a different result is appropriate, we must defer to the jury's determination of the weight to give contradictory testimonial evidence because resolution often turns on credibility and demeanor of witnesses. *Id.* When we find the evidence supporting conviction factually insufficient, we must detail all of the evidence and show how it is insufficient. *Id.* Accordingly, I will detail the relevant evidence concerning appellant's knowledge of the character and content of the offending comic book.

At the outset, relying solely on circumstantial evidence, the majority equates appellant's extensive knowledge of comic books in the store's inventory with his implied recognition of the specific obscene character and content of "Demon Beast Invasion." The majority then builds upon that tenuous equation the further improvisation that, because the book was shelved in the adults-only section of the store and had a not-for-children label on its cover, appellant "was undisputably familiar with 'Demon Beast Invasion.'" To the contrary, appellant testified he knew the comic book by its front cover only and had never seen its contents. When asked for the comic book, appellant told Reynerson the book was not in stock and offered to order it for him. When Reynerson returned with a copy of the comic book, he handed it to appellant with the front cover up. Appellant received payment from the officer and placed it in a bag. Contrary to the majority's opinion, the cover does not place appellant on notice of the comic book's content and character. The title on the cover, "Demon Beast Invasion," may be characterized as violent, but not sexually explicit. Moreover, although the majority characterizes the cover as depicting a "nude female," it actually depicts a cartoon line-drawing of a female figure, either nude or partially nude, and it suggests no sexually specific content. It does

not reveal any genitals and does not suggest a state of arousal. In fact, Reynerson described the cover as "It *appears* to be a nude female" (emphasis added). Additionally, Reynerson testified he took the comic book back to his office to compare it to other materials to determine if it met the criteria of the penal code. This is some evidence from the State the character and content of the book could not be readily determined from its cover or the label on the cover. The strongest evidence adduced by the State was Reynerson's testimony that all of the comic books he saw bearing the "Absolutely Not for Children" label contained sexually explicit depictions. However, this testimony does not add anything to the issue of *appellant's knowledge* because comic books shelved in the restricted area of Keith's Comics containing violent themes were also given this warning label.

Appellant admitted he was familiar with the title of "Demon Beast Invasion," and knew it was on three shelves restricted to adult readers because of the violent and sexual nature of the comic books placed there. He testified he had not seen the contents until they were presented at trial. His testimony was consistent with the testimony of Reynerson that appellant saw only the front cover of the comic book before he placed it in a bag and handed it to the officer. Appellant denied seeing the "absolutely not for children" label. If Reynerson had to take the book back to his office to determine its character and content, how can it be said it is "undisputable" that the restricted location of the comic book and appellant's observation of the cover placed him on notice of the character and content of "Demon Beast Invasion"?

The majority's opinion relies heavily on *Burden v. State*, 55 S.W.3d 608 (Tex. Crim. App. 2001), to sustain the jury's inferred finding of appellant's knowledge based on this limited circumstantial evidence. I respectfully suggest this reliance is misplaced. In *Burden*, an undercover detective purchased an obscene videotape from a defendant employed in the Star Adult Video Center. *Id.* at 610. The offending video was purchased by first selecting a box bearing the title: "Hardcore Schoolgirls Volume 5." *Id.* The box had several sexual statements and eleven sexually

explicit scenes. *Id.* Only sexually explicit videos were sold there. *Id.* at 611. The defendant testified the store had between twenty-five and thirty thousand videotapes, he knew the character of the films was sexually explicit, and he had a general understanding of what was on most of the tapes. *Id.* However, he denied he knew the exact content of the particular tape the detective purchased from him. *Id.* The court of criminal appeals held section 43.23(c)(1) does not require a defendant to have knowledge that what he promotes is legally obscene; the section requires only proof a defendant have knowledge of the material's sexually explicit character and content. *Id.* at 613. The defendant's own testimony provided direct evidence he had the requisite criminal scienter for conviction under section 43.23(c)(1). *Id.* at 614.

This is not so with the case before us. Here, Keith's Comics is primarily a mainstream magazine store carrying an inventory of comic books and action figures that have no sexually explicit contents. Only on three shelves in a restricted area are violent and sexually explicit books sold. Both sexually explicit and violent comic books bear the same warning label. The cover of "Demon Beast Invasion" does not reveal its sexually explicit content and character. The direct evidence of appellant's criminal scienter or knowledge of the content and character of the comic book Reynerson purchased in this case consists of (a) appellant's denial he had ever seen its contents and assertion he did not know from its cover its sexually explicit contents; (b) the restricted area contained both violent and sexually explicit materials; and (c) the warning label for children was on both types of books. Nevertheless, the majority's opinion relies solely upon the location where the book was displayed, the front cover, and the warning label to provide circumstantial evidence sufficient to prove appellant's knowledge of the book's content and character.

In criminal prosecutions implicating First Amendment rights of free expression, the State must prove the defendant had the requisite criminal scienter. *See Smith v. California*, 361 U.S. 147 (1959). Without this requirement, the State could "work a substantial restriction on the freedom of speech and press." *Id.*

With my conclusion that the cover conveyed no notice of its sexually explicit content, I would conclude the evidence falls far short of overcoming the constitutional and statutory presumption of innocence and proving beyond a reasonable doubt the requisite criminal scienter. *See* Tex. Code Crim. Proc. Ann. art. 38.03 (Vernon Supp. 2002); Tex. Pen. Code Ann. § 2.01 (Vernon 1994); *Randle v. State*, 826 S.W.2d 943, 945 n.3 (Tex. Crim. App. 1992). I would apply the factual sufficiency formulation in *Johnson*, 23 S.W.3d at 11, to conclude the proof of guilt is so obviously weak as to undermine confidence in the jury's determination.

Accordingly, I respectfully dissent from that portion of the majority opinion finding the evidence factually sufficient. Because I would conclude the evidence is factually insufficient and remand for a new trial, I would not address the merits of the remaining points of error.

TOM JAMES
JUSTICE

Publish
Tex. R. App. P. 47
001522DF.P05

File Date[07/02/2002]
File Name[001522DF]
File Locator[07/02/2002-001522DF]
Disclaimer on Opinions

Cause No. MA9972739J

THE STATE OF TEXAS	§	IN THE COUNTY
VS.	§	CRIMINAL COURT
CASTILLO JESUS A . JR	§	CCC#8 OF
	§	DALLAS COUNTY. TEXAS

JUDGMENT ON PLEA OF NOT GUILTY BEFORE THE JURY

PUNISHMENT BY THE JUDGE COMMUNITY SUPERVISION GRANTED BY JUDGE

V. CUNNINGHAM

JUDGE PRESIDING: XXXXXXXX

JULY TERM.xxxx 2000

DATE OF JUDGMENT: 8/28/00

ATTORNEY FOR STATE REXX ANDERSON

ATTORNEY FOR DEFENDANT PAUL SHUNATONA

OFFENSE CONVICTED OF: OBSCENITY

CLASS A MISDEMEANOR

DATE OFFENSE COMMITTED 9/22/99

CHARGING INSTRUMENT: INFORMATION/INDICTMENT

PLEA: NOT GUILTY

JURY VERDICT: GUILTY FOREMAN: Richard Musbach

DATE SENTENCE IMPOSED: 8/28/00 COSTS: YES/NO

PUNISHMENT AND PLACE OF CONFINEMENT	180 DYS CONFINEMENT IN THE DALLAS COUNTY JAIL AND A FINE OF $4,000.00

DATE TO COMMENCE: 8/28/00

CREDIT FOR TIME SERVED

FINE PROBATED: YES/NO

TX.C.C.P. COUNSELING FEE, IF APPLICABLE:

$_____, NOT TO EXCEED $500

TERMS OF COMMUNITY SUPERVISION: 12 MONTHS

RESTITUTION/REPARATION: YES/NO.

IF YES. NAME OF VICTIM:

ADDRESS OF VICTIM OR AGENCY TO COLLECT PAYMENTS:

AFFIRMATIVE FINDING OF FAMILY VIOLENCE, IF APPLICABLE: YES/NO)

CASE TO RUN CUMULATIVE/CONCURRENT WITH ALL OTHER CASES

On this day, set forth above, the above styled and numbered cause was called for trial. The State of Texas and Defendant appeared by and through the above named attorneys and announced ready for (trial. Defendant appeared in person in open court. Where Defendant was not represented by counsel,

Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel.

A jury of six persons WOJ duly selected, empaneled and sworn. The information\indictment was read to the jury and the Defendant's plea of not guilty was entered into the record. Evidence was submitted by the parties and the jury was charged by the Judge. The jury retired to consider the verdict and, after deliberation, returned a finding of guilty.

Prior to the commencement of trial, the Defendant filed a sworn Affidavit Of No Prior Felony Conviction stating that defendant had never before been convicted of a felony offense. Evidence was presented to (he Judge on the issue of punishment and the Judge assessed the sentence as stated above. The Judge finds that the ends of justice and the best interests of the public as welt as the Defendant will be served by suspending the imposition of the judgment und placing the Defendant on community supervision.

In the event that a presentence investigation was required by statute, said presentence investigation was done according to the applicable statute. If a presentence report was made. (he Defendant authorized, in writing, the Judge to inspect the report. Where the Defendant requested that a presentence investigation not be made the Judge agreed to that request.

It is, therefore, ordered and decreed by the Judge that said Defendant be adjudged guilty of the offense as shown above on the date as shown above, and that pursuant to the Judge's finding, the sentence is hereby suspended for the period of time set out above. It is further ordered that the Defendant pay the fine, unless probated, as stated above, court costs, expenses of legal services provided by the court appointed attorney or public defender in this cause, if any and restitution or reparation, if any, as set forth above and in the attached conditions of community supervision, if any. The Judge finds that the Defendant has the financial resources to enable the Defendant to offset said costs in the amount ordered.

It is further ordered, adjudged and decreed by the Judge

that the imposition of sentence is hereby suspended for a period of time as shown above. The Defendant is hereby placed on community supervision for a period of time as shown above and subject to the terms and conditions of community supervision imposed this day by law and by Judge and served upon the Defendant.

Conditions of community supervision attached hereto arc incorporated for all purposes as a part of the Judgment. Said conditions of community supervision include the terms of any fee payment pursuant to the Texas Code of Criminal Procedure, if applicable.

Following the disposition of this cause, the Defendant's fingerprint was placed upon a Certificate of Fingerprint. Said certificate is attached hereto and is incorporated by reference as a part of this judgment.

Community supervision expires on the 28 day of AUG , 2001
Signed and entered this 28 day of AUG , 2000

_____

Judge, County Criminal Court_____
Dallas County, Texas

38

Revised 11/1/93

NO. 05-00-01522-CR
IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

JESUS A. CASTILLO, JR.
Appellant,
vs.
THE STATE OF TEXAS,
Appellee.

An Appeal from the County Criminal Court No. 8
Dallas County, Texas
MA99-72739-J

BRIEF FOR THE APPELLANT

Paul J. Cambria, Jr.
Roger W. Wilcox, Jr.
Attorneys at Law
Admitted Pro Hac Vice
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
Ofc: 716-849-1333
Fax: 716-855-1580

Paul R. Shunatona
Attorney at Law
211 North Record, Suite 450
Dallas, Texas 75202
Ofc: 214-827-7747

Fax: 214-826-4699
SBN 18328400

IDENTITY OF PARTIES AND COUNSEL

Appellant, Jesus A. Castillo, Jr., is represented by:
Paul J. Cambria, Jr.
and
Roger W. Wilcox, Jr.
Attorneys at Law
42 Delaware Avenue, Suite 300
Buffalo, New York 14202

and

Paul R. Shunatona
Attorney at Law
211 North Record, Suite 450
Dallas, Texas 75202

Appellant, Jesus A. Castillo, Jr., was represented at trial by:

Paul R. Shunatona
Attorney at Law
211 North Record, Suite 450
Dallas, Texas 75202

Appellee, the State of Texas, is represented by:

Honorable Bill Hill
District Attorney of Dallas County
Frank Crowley Courts Building
133 North Industrial Boulevard
Dallas, Texas 75202

TABLE OF CONTENTS

Page

IDENTITY OF THE PARTIES i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ISSUES PRESENTED 3

STATEMENT OF FACTS 5

SUMMARY OF THE ARGUMENT 13

ARGUMENT:

POINT OF ERROR NUMBER ONE

APPELLANT'S CONVICTION FOR OBSCENITY IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE 14

POINT OF ERROR NUMBER TWO

THE STATE'S FAILURE TO PRESENT EVIDENCE CONCERNING THE CONTENT AND CHARACTER OF ALL FOUR VOLUMES OF THE "DEMON BEAST INVASION, THE FALLEN" SERIES RENDERS THE EVIDENCE LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION 22

POINT OF ERROR NUMBER THREE

THE STATE'S PROOF IN SUPPORT OF APPELLANT'S CONVICTION FOR OBSCENITY IS NOT FACTUALLY SUFFICIENT 25

POINT OF ERROR NUMBER FOUR

THE STATE'S FAILURE TO PRESENT EVIDENCE OF THE PROSECUTED WORK AS A WHOLE RENDERED THE PROOF IN SUPPORT OF APPELLANT'S CONVICTION FACTUALLY INSUFFICIENT 32

POINT OF ERROR NUMBER FIVE

"DEMON BEAST INVASION, THE FALLEN" IS NOT CONSTITUTIONALLY OBSCENE 33

POINT OF ERROR NUMBER SIX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IRRELEVANT AND PREJUDICIAL TESTIMONY CONCERNING THE PROXIMITY OF AN ELEMENTARY SCHOOL TO THE COMIC BOOK STORE 35

POINT OF ERROR NUMBER SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DETECTIVE REYNERSON'S OPINION THAT "DEMON BEAST INVASION, THE FALLEN" IS OBSCENE 40

POINT OF ERROR NUMBER EIGHT

APPELLANT WÁS DENIED DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS BY THE FAILURE TO RECORD THE PUNISHMENT HEARING 46

PRAYER 48

CERTIFICATE OF SERVICE 49

INDEX OF AUTHORITIES

Page

Cases:

Andrews v. State, 652 S.W.2d 370
(1983, pet ref'd) 33, 34

Barnhart v. State, 648 S.W.2d 696
(Tex. Crim. App. 1981) 34

Beasley v. State, 838 S.W.2d 695
(Tex. App. - Dallas 1992, pet. ref'd),
cert. denied, 510 U.S. 969, 114 S.Ct. 451 (1993) 42, 43, 44

Berg v. State, 599 S.W.2d 802
(Tex. Crim. App. 1980) 30

Buchanan v. State, 506 S.W.2d 236
(Tex. Crim. App. 1974) 43

Carroll v. State, 701 S.W.2d 913
(Tex. Crim. App. 1986) 18, 19

Clewis v. State, 922 S.W.2d 126
(Tex. Crim. App. 1996) 25, 32

Davis v. State, 658 S.W.2d 572
(Tex. Crim. App. 1983) 17, 23

Duckett v. State, 797 S.W.2d 906
(Tex. Crim. App. 1990), overruled on other grounds,
Cohn v. State, 849 S.W.2d 817 (Tex. Crim. App. 1993) 42

Fails v. State, 999 S.W.2d 144
(Tex. App. - Dallas 1999), cert. denied,
2001 U.S. LEXIS 2991 (2001) 38

Glass v. State, 761 S.W.2d 806
(Tex. App. - Houston 1988) 19, 21

Green v. State, 934 S.W.2d 92
(Tex. Crim. App. 1996), cert. denied,
520 U.S. 1200, 117 S.Ct. 1561 (1997) 37

Griffin v. State, 614 S.W.2d 155
(Tex. Crim. App. 1981) 16, 24

Hunt v. State, 475 S.W.2d 935
(Tex. Crim. App. 1972) 33

Jackson v. Virginia, 443 U.S. 307,
99 S.Ct. 2781 (1979) 16

Johnson v. State, 760 S.W.2d 797
(Tex. App. - Dallas 1988) 19

Johnson v. State, 23 S.W.3d 1
(Tex. Crim. App. 2000) 25

Jones v. State, 944 S.W.2d 642
(Tex. Crim. App. 1996), cert. denied,
522 U.S. 832, 118 S.Ct. 100 (1997) 26

Lee v. State, 29 S.W.3d 570
(Tex. App. - Dallas 2000) 16

Matson v. State, 819 S.W.2d 839
(Tex. Crim. App. 1991) 42

Miller v. California, 413 U.S. 15,
93 S.Ct. 2607 (1973) 22, 37, 45

Montgomery v. State, 810 S.W.2d 372
(Tex. Crim. App. 1990) 37

Paris Adult Theatre I, 413 U.S. 49,
93 S.Ct. 2628 (1973) 43

Roth v. United States, 354 U.S. 476,
77 S.Ct. 1304 (1957) 23

Schutz v. State, 957 S.W.2d 52
(Tex. Crim. App. 1997, pet. ref'd) 42, 44, 45

Smith v. California, 361 U.S. 147,
80 S.Ct. 215 (1959) 16, 17, 26

Staten v. State, 686 S.W.2d 268
(Tex. App. - Houston 1985) 18

T.K.'s Video, Inc. v. State, 871 S.W.2d 522
(Tex. App. - Fort Worth 1994, pet. ref'd) 43

The King v. Ewart, 25 N.Z.L.R. 709 17

Other Authorities:

Texas Penal Code Ann. §43.21(a)(1) 22, 24, 32

Texas Penal Code Ann. §43.23 ..... 22, 32

Texas Penal Code Ann. §43.23(c) 37

Texas Penal Code Ann. §43.23(e) 17

Texas Rules of Appellate Procedure, Rule 13.1(e) 46

Texas Rules of Appellate Procedure, Rule 30 1

Texas Rules of Evidence, Rule 401 37

Texas Rules of Evidence, Rule 403 38

Texas Rules of Evidence, Rule 403.404(b) 35

United States Constitution, First Amendment 16, 17, 34, 44

United States Constitution, Fifth Amendment 46

United States Constitution, Fourteenth Amendment 16, 46

NO. 05-00-01522-CR
IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

JESUS A. CASTILLO, JR.
Appellant,
vs.
THE STATE OF TEXAS,
Appellee.

An Appeal from the County Criminal Court No. 8
Dallas County, Texas
MA99-72739-J

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS:

COMES NOW Appellant, Jesus A. Castillo, Jr., by and through his attorneys of record, and files this his original brief pursuant to Rule 30, Tex. R. App. Proc., appealing his conviction for the offense of obscenity, and for cause would show unto the Court as follows:

STATEMENT OF THE CASE

By Information dated September 30, 1999, appellant was charged with the misdemeanor offense of obscenity for the sale of a comic book entitled "Demon Beast Invasion, the Fallen #2" on September 22, 1999 [Clerk's Record (hereinafter "C.R.") at 6]. By motion filed April 26, 2000, appellant moved in the Dallas County Criminal Court No. 8 for a determination that the comic book at issue was not obscene [C.R. at 9-10]. Said motion was denied by the Honorable Vickers L. Cunningham, Sr., by order dated August 21, 2000 [C.R. at 11].

Appellant pleaded not guilty to the charge of obscenity and a jury trial commenced on August 21, 2000. The jury rendered a verdict of guilty [Reporter's Record (hereinafter "R.R.") at 168] and on August 28, 2000, appellant was sentenced by the Court to 180 days confinement in the Dallas County Jail, one year probation and a $4,000 fine [C.R. at 38-39]. Appellant's motion for a new trial was denied by the County Court [C.R. at 40]. Appellant's notice of appeal was filed on September 15, 2000 [C.R. at 42].

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE
APPELLANT'S CONVICTION FOR OBSCENITY IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

POINT OF ERROR NUMBER TWO
THE STATE'S FAILURE TO PRESENT EVIDENCE CONCERNING THE CONTENT AND CHARACTER OF ALL FOUR VOLUMES OF THE "DEMON BEAST INVASION, THE FALLEN" SERIES RENDERS THE EVIDENCE

LEGALLY INSUFFICIENT TO SUSTAIN
APPELLANT'S CONVICTION

POINT OF ERROR NUMBER THREE

THE STATE'S PROOF IN SUPPORT OF
APPELLANT'S CONVICTION FOR OBSCENITY
IS NOT FACTUALLY SUFFICIENT

POINT OF ERROR NUMBER FOUR

THE STATE'S FAILURE TO PRESENT
EVIDENCE OF THE PROSECUTED WORK
AS A WHOLE RENDERED THE PROOF IN
SUPPORT OF APPELLANT'S CONVICTION
FACTUALLY INSUFFICIENT

POINT OF ERROR NUMBER FIVE

"DEMON BEAST INVASION, THE FALLEN"
IS NOT CONSTITUTIONALLY OBSCENE

POINT OF ERROR NUMBER SIX

THE TRIAL COURT COMMITTED REVERSIBLE
ERROR IN ADMITTING IRRELEVANT AND
PREJUDICIAL TESTIMONY CONCERNING
THE PROXIMITY OF AN ELEMENTARY
SCHOOL TO THE COMIC BOOK STORE

POINT OF ERROR NUMBER SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION
IN ADMITTING DETECTIVE REYNERSON'S
OPINION THAT "DEMON BEAST INVASION,
THE FALLEN" IS OBSCENE

POINT OF ERROR NUMBER EIGHT
APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS BY THE FAILURE TO RECORD THE PUNISHMENT HEARING

STATEMENT OF FACTS

"Demon Beast Invasion, the Fallen" is the second volume of a four-volume comic book series created in the Japanese "manga" style [R.R. at 97]. This volume was sold by Keith's Comics store clerk, appellant Jesus Castillo, to Dallas Police Detective Craig A. Reynerson on September 22, 1999 and is the focus of this appeal.

Five witnesses testified before the jury in Dallas County Court, including two defense experts on comic books and Japanese literature. The State's case was limited to the testimony of Detective Reynerson [R.R. at 29-60].

Located on East Mockingbird Lane in the City of Dallas, Keith's Comics offered comic books, such as Batman, Superman, etc., and fantasy paraphernalia, such as figurines of action figures and comic book characters, to the general public [R.R. at 32-35]. Detective Reynerson visited Keith's Comics "to see if there was any obscenity being sold in the store" [R.R. at 32-33]. Upon entering, Detective Reynerson proceeded to the back of the store into an area marked off by a sign which read "No One Under 18 Allowed Past This Point" [R.R. at 33-34, 48]. There were no children in this area of the store and Detective Reynerson picked out a comic book entitled "Demon Beast Invasion, the Fallen." The cover contained what appeared to be a drawing of a nude female [R.R. at 34-35, 48]. The cover also contained the statement "Absolutely Not For Children" [R.R. at 36].

Having made his selection, Detective Reynerson proceeded to the cash register. He described handing the comic book, front cover up, to appellant, who charged him $3.19 and placed the comic book in a bag for the detective [R.R. at 37-38]. After making his purchase and leaving the store, Detective Reynerson directed a uniformed patrol officer to enter Keith's Comics for the purpose of obtaining appellant's identification [R.R. at 38].

Jesus Castillo had a different recollection of events on September 22, 1999. A manager at Keith's Comics for approximately three years, appellant sold comic books mostly to adults. In fact, the store carried comic books with violent and mature themes and offered them for sale in a special section in the back of the store clearly marked off limits to children. Appellant refused to allow children in that area and would not sell violent or adult-themed comic books to anyone under the age of eighteen [R.R. at 134-136].

Appellant recalled Detective Reynerson entering Keith's Comics and proceeding directly to the back of the store. After about five minutes in the "18 and Older" section, appellant approached the detective and asked if he needed help. Detective Reynerson asked specifically for "Demon Beast" and appellant replied that the believed the store had sold out of that title [R.R. at 137]. The detective advised appellant that he did not want to put the book on a request list, so appellant returned to the front of the store [R.R. at 137-138].

A few minutes later, Detective Reynerson approached appellant with a book. Appellant saw the title "Demon Beast" on the cover, but did not open the book up to look inside. He also did not see anything on the cover indicating the book contained adult content. In fact, Detective Reynerson did not ask him about the content of the book and appellant did not know what the book contained until it was produced in court during the trial [R.R. at

137-139]. While appellant understood that some comic books in the adult section carried a warning stating "Absolutely Not For Children" and contained sexually explicit material, that warning was not exclusive to titles containing sexually oriented content and could also apply to comic books with violent, but not sexual, themes [R.R. at 140-141].

The two defense experts explained the literary and artistic significance of the subject comic book, with particular reference to the work placed in the historical context of Japanese manga. A comic book artist and media writer, Scott McCloud graduated magna cum laude from Syracuse University and published a comic book series from 1984 to 1990. McCloud also wrote two books about comics, the first of which was published in 1994 and received various awards, including a nomination for a Hugo Award and being named a New York Times notable book for 1994. McCloud's professional qualifications included lectures at the Smithsonian Institution, the Massachusetts Institute of Technology, IBM and various art colleges [R.R. at 65-69].

According to McCloud, comic books can have serious literary, artistic, political and scientific value. For example, a two-volume, approximately four hundred page, comic book concerning the Holocaust won both a Guggenheim Award and a Pulitzer Prize. Further, comic books are not bought primarily for or by children. Rather, 18-24 year old readers make up the largest segment of comic book buyers (37%) [R.R. at 70-75].

Having read all four volumes of "Demon Beast Invasion, the Fallen" -- not just a single book -- McCloud explained that the four volumes are a thematic whole containing popular Japanese horror and science fiction themes dealing with the concept of an alien infiltration of earth culture [R.R. at 76-78]. While the storyline is provocative and sexually oriented, it also brings into focus a central conflict created by the alien invasion: how to weigh

the value of personal relationships against one's greater duty to mankind [R.R. at 76-78].

McCloud stressed that the sexual relationships depicted in Volume 2 must be viewed in context of the work as a whole (all four volumes). For instance, the sexual themes in Volume 2 do not stand alone; the depictions there are to be juxtaposed against the healthy, normal relationships found at the beginning of Volume 1 for the purpose of showing the ways in which certain characters have been changed by the alien invasion [R.R. at 83-90].

Susan Napier is an associate professor in the Department of Asian Studies at the University of Texas. A professor since 1984, Napier was to become a visiting professor at Harvard University during the spring semester of 2001. She has studied Japanese literature and culture for approximately twenty-seven years [R.R. at 96-97]. Professor Napier's studies have also concerned Japanese film and visual arts [R.R. at 96-97].

Professor Napier gave *unchallenged* testimony concerning Japanese comic books or "manga." She noted that the University of Texas has an anime (Japanese for "animation") and manga club with about 150 members. One of the biggest clubs in the country, its members meet every Friday to watch anime. Professor Napier also recently finished writing a book concerning Japanese animation; the book contains a chapter about manga [R.R. at 97-98].

With respect to the comic book series "Demon Beast Invasion, the Fallen," Professor Napier also emphasized the importance of considering the work as a whole, rather than simply a single volume. As described by Professor Napier, the opening volume of the series sets the theme of an alien invasion of the Earth. Demon aliens are opposed in their endeavor by an anti-demon police force. A central theme of the series is a love relationship between Muneto, one of the anti-demon hunters, and a girl named Kayo. The series tracks the development of this relationship during

the alien invasion. Muneto is forced to deal with Kayo's kidnapping as well as his own killing of his friend, Cusa, whose body a demon had taken over [R.R. at 98-101]. This theme of alien deception continues in a scene in Volume 2 in which Kayo is depicted having sexual relations with someone she believes is Muneto, but who actually turns out to be a demon disguised as him [R.R. at 106-108]. Volume 3 in the series presents Kayo's apparent pregnancy and the advances of a demon who is trying to convince her to marry him for the purpose of creating a new world order [R.R. at 116]. Kayo resists these advances and, in Volume 4, appears to save the world by destroying the demons. However, in the final scene, there is a suggestion that all is not well because one female demon survives and goes off into the world disguised as a human [R.R. at 116-118].

In addition to discussing the overall thematic content of the series, Professor Napier explained that demons are popular in Japanese comics and that the Japanese have a cultural fascination with metamorphosis and strange bizarre creatures extending back to the fifteenth century. Many Japanese comic books also feature an apocalyptic theme, as does "Demon Beast Invasion, the Fallen" [R.R. at 102-103].

With respect to Volume 2, Professor Napier observed that the tree involved in one of the sexual episodes is significant as an organic Japanese symbol of nature. The tree has some human aspects and its roots appear to resemble tentacles. These tentacles relate to a famous Japanese theme originating in the early nineteenth century. In fact, a well-known erotic print by an artist named Hokusai entitled "The Dream of the Fishermen's Wife" depicted a naked woman having relations with two octopi. According to Professor Napier, the print reflects a Japanese fascination with tentacles and non-human creatures [R.R. at 109-110].

Professor Napier further noted that manga comics similar to this series are prevalent in Texas. Further, she did not feel a shameful or morbid interest in nudity, sex or excretion as a result of viewing Volume 2 in particular. Rather, the comic book had literary value in the sense that it had a narrative interest, suspense and a love story. Moreover, the comic book contained "extraordinary scenes that are really quite beautifully drawn," substantiating the serious artistic value of the work. Finally, the comic book had political value insofar as it addressed issues of powerlessness [R.R. at 114-116].

Licensed private investigator Michael Christopher testified concerning the availability of comparable materials in Dallas County. During the weeks prior to trial, Christopher visited a number of stores in Dallas County and bought adult magazines. A Penthouse magazine bought at a "Park-It Market" less than a mile from Keith's Comics showed actual penetration of a vagina by a penis. The issue also contained oral sex, ejaculation and depictions of two women having sex with a grasshopper. Christopher testified that Penthouse is available at numerous places in Dallas County [R.R. at 119-122; Defense Exhibit 2].

At "Priscilla's," a boutique offering sex toys, videotapes and sexy clothing, Christopher purchased three magazines: (1) "Derriere" (which depicted intercourse between men and women involving actual penetration, anal sex and women performing oral sex on each other); (2) "Nugget" (a bondage magazine showing various sex acts involving males and females); and (3) a magazine depicting women in various sexual poses, fondling themselves and using sex toys [R.R. at 123-126; Defense Exhibits 3, 4 and 5]. Finally, Christopher visited an adult bookstore approximately one mile from the courthouse. There, he purchased a magazine entitled "Bitches and Snatches," which focused on bondage and lesbian activity [R.R. at 128; Defense Exhibit 6].

As a private investigator, Christopher had spent a year and a half to two years gathering sexually explicit materials for attorneys. Based on this experience, Christopher concluded that such materials are prevalent in the State of Texas and are acceptable in Texas [R.R. at 129].

SUMMARY OF ARGUMENT

Appellant presents eight issues for review by this Court. He contends that his conviction of misdemeanor obscenity is not supported by legally or factually sufficient evidence. Appellant also maintains that the State's failure to present the prosecuted comic book series as a whole rendered the proof against him legally and factually insufficient.

Additionally, appellant submits that this Court, upon its own independent review, should come to the conclusion that "Demon Beast Invasion, the Fallen" is not constitutionally obscene. Further, if the Court does not reverse his conviction and enter a judgment of acquittal in light of Points of Error One through Five, appellant submits that the trial court's abuse of discretion in admitting highly prejudicial testimony concerning the comic bookstore's location near an elementary school and its abuse of discretion in allowing, over objection, a Dallas Police Department detective to state his opinion that the comic book at issue lacked serious literary, artistic, political or scientific value and was obscene requires reversal of his conviction and remand for a new trial.

Finally, appellant maintains that remand for a new punishment hearing is required by the failure of the court reporter to record the punishment hearing below as requested by trial counsel.

ARGUMENT

POINT OF ERROR NUMBER ONE

APPELLANT'S CONVICTION FOR OBSCENITY IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

Appellant stands before this Court convicted of the crime of obscenity for selling a comic book to a Dallas police officer. Unlike the many other cases in which obscenity convictions have been obtained against employees of clearly adult enterprises, the comic book sold by Jesus Castillo at Keith's Comics was only part of a predominantly non-adult themed general market inventory of comic books and related novelties such as action hero figurines. Appellant respectfully submits that the evidence presented by the State was insufficient to establish beyond a reasonable doubt his knowledge of the content and character of the materials sold.

At trial, the State's case only consisted of the testimony of Dallas Police Department Detective Craig Reynerson. As detailed more comprehensively above, Detective Reynerson described entering Keith's Comics and observing numerous shelves and a couple of display cases with comic books and figurines of comic book and action hero characters [R.R. at 33-34]. Among the general market comic books were titles such as "Batman" and "Superman." As Detective Reynerson described it, "Most of the comic books that I saw were the action fantasy type comic books, such as Batman, Superman, all those fantasy figures that they make movies out of, also. Most of the comic books contained that type of stories [sic] with those type of people in them" [R.R. at 35].

In contrast, the comic book at issue -- "Demon Beast Invasion, the Fallen" -- was found by Detective Reynerson on one of only three shelves in the back of the store which contained adult-

themed comic books [R.R. at 35-36]. Significantly, Detective Reynerson testified that he selected "Demon Beast Invasion, the Fallen" because the cover contained what appeared to be a nude female [R.R. at 36]. This qualification by Detective Reynerson becomes significant upon review of the cover of the subject comic book, which was admitted into evidence as State's Exhibit 1 [R.R. at 43]. In fact, the cover at issue contains an artistic depiction of a female whose nudity could be inferred, but the drawing itself does not contain any depiction of uncovered female breasts or genitalia [see, State's Exhibit 1].

After selecting this comic book as the focus of his obscenity search, Detective Reynerson brought it to the counter and handed it face up to appellant. The $2.95 price and a bar code were on the front cover, along with the words "Absolutely Not For Children" [R.R. at 36-38; State's Exhibit 1]. Appellant took Detective Reynerson's money and then placed the comic book in a bag [R.R. at 37]. This is the sum total of the State's proof with respect to Jesus Castillo's knowledge of the content and character of the comic book selected for prosecution by Detective Reynerson.

Appellant contends that the State's proof was legally insufficient to prove beyond a reasonable doubt that he knew the content and character of the comic book purchased by Detective Reynerson. The Fourteenth Amendment of the United States Constitution requires that state court criminal convictions be supported by evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See, Griffin v. State, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). As this Court has explained, when reviewing legal sufficiency of the evidence, the Court of Appeals views the evidence in the light most favorable to the prosecution. Lee v. State, 29 S.W.3d 570, 574 (Tex. App. - Dallas 2000).

The legal sufficiency of the State's evidence must be viewed in light of the constitutional dimension of the requirement that the State prove beyond a reasonable doubt that an accused knew the content and the character of the material alleged to be obscene. In Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959), the United States Supreme Court rejected a bookseller's *per se* liability for the sale of an obscene work. Concerned that laws dispensing with any requirement that it be shown that a bookseller knew of the content of the prosecuted work would have a chilling effect on the dissemination on constitutionally protected expression, the Court found a scienter element to be constitutionally mandated. Id. at 152-53, 80 S.Ct. at 218-19. Observing that the First Amendment guarantee of freedom of speech stands in the way of opposing strict criminal liability on booksellers, Justice Brennan defined the constitutional concern in terms aptly considered in the context of the case at bar:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." The King v. Ewart, 25 N.Z.L.R. 709, 729 (C.A.). And

> the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.

Smith v. California, supra at 153, 80 S.Ct. at 218-19.

The Texas Court of Criminal Appeals came to a similar conclusion in rejecting the constitutionality of the statutory presumption (Texas Penal Code Ann. §43.23[e]) of knowledge of the content and character of purportedly obscene material in Davis v. State, 658 S.W.2d 572 (Tex. Crim. App. 1983). Noting the potential First Amendment infringement, the Davis Court warned that:

> Legislation which sanctions conviction of a bookseller, or his employee, without any proof whatsoever that he knew or was familiar with the nature of the material that was exhibited is afflicted with precisely the same vice and produces the same objectionable results as the ordinance struck down in Smith v. California.

Id. at 578.

Trial counsel's motion for an instructed verdict was premised directly upon this issue. Observing that the only evidence produced by the State to show Jesus Castillo's knowledge of the content and character of "Demon Beast Invasion, the Fallen" was the cover of the work, counsel maintained that the evidence of scienter was insufficient [R.R. at 60-61]. Even viewing the evidence in the light most favorable to the State, appellant submits that no rational trier of fact could have found beyond a reasonable

doubt that he knew of the content and character of the materials contained in this comic book.

While it need not be demonstrated by eyewitness testimony that a vendor has perused the contents of a magazine or book which is the subject of an obscenity prosecution, Carroll v. State, 701 S.W.2d 913, 914 (Tex. Crim. App. 1986), and the cover of a disputed work might provide some evidence on the issue, Staten v. State, 686 S.W.2d 268 (Tex. App. - Houston 1985), the context of the alleged promotion of the suspect material is critically important.

On this review, the question necessarily focuses on what proof the prosecution put before the jury on the issue of scienter besides a non-graphic comic book cover. In those published decisions affirming convictions, in part, on the basis of sufficient proof of an accused's knowledge of the content and character of the materials he sold, scienter was essentially an unavoidable conclusion in light of circumstances strongly indicative of the seller's awareness of the graphic sexual content of the majority of the inventory made available to the public. For example, in Staten v. State, supra, not only did the cover of the magazine in dispute contain "highly explicit photographs of sex acts between a man and a woman" portraying actual sexual relations, but the store was clearly an adult bookstore which did not retail any "regular" magazines such as Time or Newsweek, and which carried as its inventory only sexually explicit magazines similar to the one charged and sexual devices which were displayed for sale. Id. at 270. Similarly, in Carroll v. State, supra, defendant's conviction was affirmed upon evidence that he worked in an adult bookstore which purveyed apparently obscene devices and magazines whose covers depicted ultimate sexual acts. Id. at 915. The store exhibited numerous signs containing the words "Hard Core" and numerous sexually explicit movie stills labeled "Dirty Movies." Direct testimony was also offered that the defendant in that case himself unpacked the graphic magazines, placed them in a plastic

cellophane wrapper and heat-sealed the magazines before placing them on the shelves. Id.; see also, Glass v. State, 761 S.W.2d 806 (Tex. App. - Houston 1988) [Where knowledge of content and character was shown by the State's proof that, in addition to a magazine cover containing depictions of sexual intercourse, the defendant worked in an adult bookstore named "Hot X Adult Theatre"; the bookstore contained "rows and rows" of adult magazines along each wall and the magazine selected for prosecution had a sexually explicit title].

This Court came to a similar conclusion in Johnson v. State, 760 S.W.2d 797 (Tex. App. - Dallas 1988). There, the defendant claimed that the State's evidence concerning his knowledge of the content and character of the magazine ("F---in' With Soul") he sold to a police officer was insufficient to sustain his conviction. In rejecting Johnson's contentions, this Court pointed out that (1) the defendant worked in an adult bookstore with opaque windows and a sign stating, "If nudity offends you, do not enter"; (2) the adult bookstore did not sell general subscription magazines such as Time or Newsweek; (3) the inventory of the store consisted of magazines with sexually explicit covers depicting acts of sexual intercourse or deviant sexual intercourse; and (4) the copy of "F---in' With Soul" magazine was wrapped in clear cellophane on a shelf in clear view of the defendant. Id. at 800. Significantly, in affirming Johnson's conviction the Court observed that, "While no one of these elements is adequate to convict, their combination with the depictions on the magazine's cover and Johnson's opportunity to view it, are more than sufficient to find Johnson guilty of promotion of obscenity." Id. (citations omitted).

The circumstances presently before this Court could not be more different. Appellant did not work in an adult bookstore and did not retail predominantly sexually explicit materials. Rather, Keith's Comics was just that: a comic book store. By Detective Reynerson's own admission, the store contained mostly mainstream

works such as Batman and Superman. No sexual devices were displayed; only comic book and action hero figurines.

Even the cover of the subject work did not clearly indicate graphic sexual content. Unlike the foregoing cases, the cover did not contain photographic depictions of actual sexual conduct or even graphic nudity. Instead, the comic book's cover contained an artist's rendering of an apparently unclad female. Far from highlighting depictions of actual sexual acts, the cover did not even show uncovered female breasts (see, State's Exhibit 1). Moreover, unlike many of the vulgar and sexually explicit titles targeted in other prosecutions, "Demon Beast Invasion, the Fallen" suggests a non-sexual, horror/science fiction theme. To the same extent that a sexually-explicit cover is descriptive of the content of a magazine or videotape and, therefore, may be considered as some evidence of the nature and content of the expressive work, a cover which is descriptive of other themes should also receive consideration as evidence of the thematic content and character of the work. See, Glass v. State, supra.

Under these circumstances, and considering the constitutional implications of the scienter requirement as recognized by both the United States Supreme Court and the Texas Court of Criminal Appeals, appellant respectfully submits that no rational trier of fact could have found beyond a reasonable doubt that appellant knew the content and character of "Demon Beast Invasion, the Fallen." Accordingly, the trial court erred in denying appellant's motion for an instructed verdict and appellant respectfully requests that this Court issue an order reversing his conviction and enter a judgment of acquittal on the count of obscenity charged in the information.

POINT OF ERROR NUMBER TWO

THE STATE'S FAILURE TO PRESENT EVIDENCE CONCERNING THE CONTENT AND CHARACTER OF ALL FOUR VOLUMES OF THE "DEMON BEAST INVASION, THE FALLEN" SERIES RENDERS THE EVIDENCE LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION

Texas Penal Code Ann. §§ 43.21(a)(1) and 43.23 require the trier of fact to consider "the whole of the material" in determining whether the prosecuted work appeals to the prurient interest and lacks serious literary, artistic, political or scientific value. See also, Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973). The jury in appellant's case was charged in a manner consistent with these requirements [C.R. at 28-30].

In a case of apparent first impression, appellant maintains that the proof adduced by the State at trial was legally insufficient because the prosecution presented evidence concerning the content and character of only one volume of the four-volume series of which the charged work ("Demon Beast Invasion, the Fallen", Volume 2) was just a part. The language of the statute and the standards set forth by the Supreme Court in Miller plainly require that, when considering the issues of prurient appeal and serious literary, artistic, political or scientific value, the allegedly obscene material must be "taken as a whole." See, Texas Penal Code Ann. §43.21(a)(1); Miller v. California, supra. In fact, no such proof was presented by the State at trial below, despite credible testimony from defense experts detailing the fact that the subject matter and the thematic content of the charged comic book (Volume 2) were coherent and integral parts of the entire series' presentation. For instance, Professor Napier explained that it is important to know all four volumes to get a true and accurate understanding of the

storyline and character development [R.R. at 99-108, 116-118]. Similarly, comic book expert Scott McCloud testified that he had read all four volumes of "Demon Beast Invasion, the Fallen" and had concluded that the series comprised a "thematic whole" [R.R. at 75-76]. He also stated his opinion that the series as a whole possessed literary and artistic merit [R.R. at 76-77].

Judged against this backdrop, it is clear that the State failed in its obligation to present the allegedly obscene work as a whole. Instead, the prosecution impermissibly presented only an excerpt of the whole work, thereby depriving the jury of its statutorily-mandated quantum of proof. Indeed, as far back as Roth, the expansive nature of the jury's investigation into the content and character of the work was recognized. Roth v. United States, 354 U.S. 476, 490, 77 S.Ct. 1304, 1312 (1957) [notably, the trial judge in Roth charged the jury that "the books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion"]; see also, Davis v. State, 658 S.W.2d 572, 575 (Tex. Crim. App. 1983) [where the Court of Criminal Appeals pointed out that the police officer involved took care to put a sufficient number of quarters into a video viewing booth machine to ensure that he would be able to watch the disputed film in its entirety].

The State did not shoulder its burden of placing the entire comic book series before the jury for its consideration. Consequently, the jury's verdict on the charged count of obscenity was based on evidence which could never be legally sufficient simply because the State failed to meet the minimum requirements of Texas Penal Code Ann. §43.21(a)(1) and the charge as given to the jury [C.R. at 28-31]. Accordingly, appellant respectfully submits that a rational trier of fact could not have found all of the required elements beyond a reasonable doubt, Griffin v. State, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981), and, therefore, requests

that this Court reverse his conviction and enter a judgment of acquittal.

POINT OF ERROR NUMBER THREE

THE STATE'S PROOF IN SUPPORT OF APPELLANT'S CONVICTION FOR OBSCENITY IS NOT FACTUALLY SUFFICIENT

Appellant also contends that his conviction is not supported by factually sufficient evidence. Not only did the State's proof fail in substantiating scienter beyond a reasonable doubt, its proof as to the remaining elements of obscenity cannot reasonably support conviction.

This Court is invested with the power to examine the factual sufficiency of the evidence adduced in support of a conviction obtained by the State. Clewis v. State, 922 S.W.2d 126, 131 (Tex. Crim. App. 1996). As the Clewis Court explained, "In conducting its factual sufficiency review, an appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination." Id. at 133. A view of the evidence in a light most favorable to the prosecution has no place in a factual sufficiency analysis. As the Court of Criminal Appeals recently reiterated:

> In determining the factual sufficiency of the elements of the offense, the reviewing court "views all the evidence without the prism of 'in the light most favorable to the prosecution,' [i.e., views the evidence in a neutral light,] and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." The court reviews the evidence weighed by the jury that tends to prove

> the existence of the elemental fact in dispute and compares it to the evidence that tends to disprove that fact.

Johnson v. State, 23 S.W.3d 1, 6-7 (Tex. Crim. App. 2000) (citations omitted).

Even affording appropriate deference to the trier of fact, Jones v. State, 944 S.W.2d 642, 648 (Tex. Crim. App. 1996), cert. denied, 522 U.S. 832, 118 S.Ct. 100 (1997), the conviction in this case is so clearly wrong and unjust that reversal is required. Notably, without belaboring the preceding discussion concerning the lack of evidence demonstrating appellant's knowledge of the content and character of the comic book he sold, on a factual sufficiency analysis it is appropriate to also consider the proof offered by the defense in negation of the scienter element. In this regard, appellant would specifically direct the Court to the photographs of the interior of Keith's Comics, which were introduced into evidence as Defense Exhibits 1A-1S. These photographs illustrate the predominantly non-adult nature of the store and its inventory and put the Smith v. California concerns into a contemporary perspective. Keith's Comics is most clearly the type of "bookseller" Justice Brennan feared a scienter element was most needed to protect. Unlike the myriad of cases which find their genesis in sales out of unequivocally adult bookstores or adult video stores, the Japanese manga comic book purchased from appellant was offered as only a small part of a general market inventory offering customers the opportunity to purchase culturally iconic, *albeit* cartoonish, works such as Superman and Batman (which even members of this Court may have enjoyed in their youth).

Moreover, the fact that this non-graphic comic book cover contains the warning "Absolutely Not For Children" is not dispositive of a sexually obscene character. Rather, as appellant explained at trial, while some comic books in the "18 and Older"

section carrying that warning may contain sexually explicit material, Keith's Comics also carried comic books in the same section which presented themes of violence with little or no sexual content for which such a warning would also be appropriate [R.R. at 140-141]. Accordingly, the paucity of proof offered by the State on the scienter issue is further diminished in force by ambiguity once the prosecution-favorable prism of legal sufficiency review is removed. When weighed against competing facts and inferences, the State's evidence that Jesus Castillo knew of the content and character of this comic book falls dramatically short of the quantum of proof necessary to insure confidence that this conviction of a comic book store employee is right and just.

The State's evidence also does not support the jury's verdict with respect to the element of serious literary, artistic, political or scientific value. Appellant submits that viewed as a whole, a reasonable person would not find that "Demon Beast Invasion, the Fallen" lacks the requisite serious value.

The overwhelming evidence at trial convincingly established that "Demon Beast Invasion, the Fallen" was created in the stylistic Japanese "manga" format and reflects popular contemporary Japanese horror and science fiction concepts, as well as traditional Japanese themes. For example, Professor Napier discussed the demonic concept popular in Japanese comics and how it relates to a traditional fascination with metamorphosis and bizarre creatures [R.R. at 102-103]. This testimony complemented the observations of comic book artist and media writer, Scott McCloud, who described "Demon Beast Invasion, the Fallen" as an example of the Japanese horror and science fiction genre [R.R. at 76-78].

Moreover, to counter the erroneous admission of Detective Reynerson's personal opinion concerning the obscène nature of the comic book, appellant presented testimony from both defense experts concerning the serious literary, artistic and political value of

"Demon Beast Invasion, the Fallen." Professor Napier found serious literary and artistic value in the storyline and in "extraordinary scenes that are really quite beautifully drawn" [R.R. at 114-116]. McCloud noted the provocative nature of the story and the personal/societal conflicts brought into focus by the alien invasion [R.R. at 76-78]. As to artistic merit, as an artist himself, McCloud was able to explain to the jury that it takes a tremendous amount of hard work and skill to create comic books and that "this artist has ascended a number of levels to get to this point. There are better works out there, for certain, but they have tried very hard to create interesting compositions to tell the story through pictures and sequence. And this is tough work and they have come a long way to get to this point" [R.R. at 77-78].

The testimony of Professor Napier and Scott McCloud concerning the value of "Demon Beast Invasion, the Fallen" as a literary and artistic creation went essentially unchallenged by the prosecution. Instead, the prosecutor concentrated her cross-examination primarily on the fact that the comic book did have, in part, a sexual theme. However, even as to the sexual depictions contained in the book, both Professor Napier and Scott McCloud pointed out that the illustration of such topics related to a larger theme and, indeed, a Japanese historical tradition. For instance, Professor Napier explained that the tree portrayed in one erotic scene is significant as "an organic Japanese symbol of nature" [R.R. at 109]. Specifically, Professor Napier observed:

> And this is, again, very much a part of Japanese culture that the tree is sort of like this kind of organic symbol of nature. And in a lot of these stories and in Japanese culture in general, you have a sense of humans and beasts and demons and nature all kind of as one part of a long continuum. And so the tree is partly a tree and it's, also, you know, partly got this human aspect,

> too. The humans are actually really part of the tree.

[R.R. at 109]. Professor Napier also explained that the tentacle-like nature of the tree's roots reflect a traditional Japanese fascination with tentacles as a representation of power, and pointed out that this theme can be traced historically to the early nineteenth century [R.R. at 109-110].

Similarly, McCloud rejected the prosecutor's suggestion that the erotic scenes contained in "Demon Beast Invasion, the Fallen" were simply gratuitous. Rather, in McCloud's opinion, the scenes represent the artist's intent to portray pure evil as well as the changes wrought by evil forces [R.R. at 82-84]. Significantly, both Napier and McCloud expressed their concern that the serious value of the comic book at issue was derived in part from its exposition of themes which originated in the first volume or were continued to fruition in Volumes 3 and 4 [R.R. at 76-77, 85-90, 99-108, 116-118].

The proof at trial established that "Demon Beast Invasion, the Fallen" is an artistic creation of serious value. The work is part of a series which, as a thematic whole, portrays a *bona fide* storyline reflective of popular Japanese horror and science fiction themes. The artistic renderings are of quality and echo traditional Japanese cultural interests such as man's relation to nature and power. Accordingly, the evidence overwhelmingly demonstrated that the work did not lack serious literary, artistic, political or scientific value, despite Detective Reynerson's differing personal opinion. Accordingly, appellant respectfully submits that the evidence weighs heavily in favor of the comic book's constitutionally protected status.

Finally, on the evidence presented one would be hard pressed to conclude that this comic book is patently offensive or

appealed to the prurient interest in light of the contemporary community standards. Through private investigator Michael Christopher, the defense presented evidence that comparable, indeed more graphic, materials were widely available in Texas and, in particular, Dallas County [R.R. at 119-133]. See, e.g., Berg v. State, 599 S.W.2d 802 (Tex. Crim. App. 1980) [magazines and films purchased at various locations near Johnson County admissible as evidence of contemporary community standards]. The jury had before it several sexually explicit magazines which the investigator had purchased in the Dallas area. These magazines depicted photographic portrayals of actual intercourse, oral sex, ejaculation, anal sex, fondling, bondage and lesbian erotica [R.R. at 119-128]. Certain pictorials displaying actual vaginal penetration by a penis, as well as oral sex and ejaculation, were contained in an issue of Penthouse magazine [Defense Exhibit 2] which was purchased at a convenience store less than a mile from Keith's Comics and which was also available at numerous retail locations in Dallas County [R.R. at 120-122].

While the prosecution is not under an obligation to affirmatively prove the prevailing community standards, the defense case unquestionably demonstrated that the artistic renderings in the comic book at issue certainly did not violate community standards with respect to what is considered patently offensive or appealing to the prurient interest.

WHEREFORE, appellant respectfully requests that, in light of the foregoing analysis of the factual insufficiency of the State's case, this Court issue an order reversing his conviction and enter a judgment of acquittal on the count of obscenity charged in the information.

POINT OF ERROR NUMBER FOUR

THE STATE'S FAILURE TO PRESENT EVIDENCE OF THE PROSECUTED WORK AS A WHOLE RENDERED THE PROOF IN SUPPORT OF APPELLANT'S CONVICTION FACTUALLY INSUFFICIENT

Without repeating the arguments set forth in Points of Error Two and Three, appellant reiterates that the proof in support of his conviction is factually insufficient by virtue of the State's failure to present evidence concerning the content and character of all four volumes of the comic book series of which "Demon Beast Invasion, the Fallen" is a part. Clewis v. State, 922 S.W.2d 126, 131 (Tex. Crim. App. 1996). As noted above, consideration of the prosecuted work as a whole is a critical concept of obscenity law and is an analysis mandated by Texas Penal Code Ann. §§ 43.23 and 43.21(a)(1). Having presented proof concerning only one of the four volumes which make up this comic book series, the State did not satisfy its obligation to ensure that the jury came to its judgment of the obscenity *vel non* of the charged work only after it had taken the work as a whole -- as the jury instructions charged it to do.

Accordingly, appellant contends that his conviction of obscenity is clearly unjust, warranting reversal of his conviction and entry of a judgment of acquittal by this Court.

POINT OF ERROR NUMBER FIVE

"DEMON BEAST INVASION, THE FALLEN" IS NOT CONSTITUTIONALLY OBSCENE

Despite the jury's verdict, this Court is charged with the duty of making its own independent judgment as to whether the comic book, "Demon Beast Invasion, the Fallen" is constitutionally

obscene. See, Hunt v. State, 475 S.W.2d 935 (Tex. Crim. App. 1972). As the Court of Criminal Appeals explained in Andrews v. State, 652 S.W.2d 370 (1983, pet. ref'd), on an appeal from a jury verdict "it is now incumbent upon intermediate appellate courts of this State, as we must do when such a conviction is properly before us, to make the independent determination whether the material that is alleged to be obscene is constitutionally obscene." Id. at 383.

In this regard, appellant relies on but will not reiterate the foregoing discussions of the constitutionally protected nature of the subject comic book. Appellant would note, however, that an important focus of an appellate court's independent analysis of the obscenity *vel non* of a prosecuted work is whether the material has any serious literary, artistic, political or scientific value. See, Andrews v. State, supra.

In this case, Japanese literature and cultural expert, Professor Susan Napier, and comic book artist and media writer, Scott McCloud, gave credible testimony concerning the artistic worth of the comic book artist's renderings and presented a detailed analysis of the serious thematic elements of this manga-style work. Appellant submits that a reasonable person would recognize sufficiently serious artistic and literary value in this comic book to warrant First Amendment protection. Certainly, "Demon Beast Invasion, the Fallen" must be distinguished from simple graphic photographic portrayals of actual sexual conduct which are not presented in the context of a storyline or *bona fide* literary theme. While "Demon Beast Invasion, the Fallen" may not be "Catcher In The Rye," neither is it "Swedish Erotica No. 25" (Andrews v. State, supra) or "3-Way Cum" (Barnhart v. State, 648 S.W.2d 696 [Tex. Crim. App. 1983]).

Appellant respectfully requests that this Court consider the obscenity *vel non* of "Demon Beast Invasion, the Fallen" and, upon

review, issue an order reversing his conviction and enter a judgment of acquittal on the count of obscenity charged in the information.

POINT OF ERROR NUMBER SIX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IRRELEVANT AND PREJUDICIAL TESTIMONY CONCERNING THE PROXIMITY OF AN ELEMENTARY SCHOOL TO THE COMIC BOOK STORE

Prior to trial, appellant moved *in limine* for an order precluding the State from making any reference to the fact that Keith's Comics was in close proximity to an elementary school. Defense counsel maintained that such evidence was irrelevant and that its probative value, if any, was outweighed by its prejudicial effect [R.R. at 6-7]. Counsel emphasized his fear that the jury would interpret any such reference as an allusion to the potential for pedophilic activity because of the geographical nexus between the school and a comic book store which allegedly carried obscene materials [R.R. at 6-7].

Applying Tex. R. Evid. "403.404(b)", the trial court ruled that the State would be allowed to offer testimony concerning the location of Keith's Comics vis-à-vis the school. Curiously, the court stated, "And given the jury's power in determining what the community standard is, I have to take the community as a whole and this is simply a fact as to where this is in the community and I'm going to deny your Motion in Limine No. 1" [R.R. at 7].

During direct examination of Detective Reynerson, the following colloquy occurred:

> Q. Okay. And can you describe the neighborhood in which the store is located?

A. It's a combination of commercial and residential neighborhood, strip shopping center, *and a school right in the immediate vicinity.*

Q. How close would you say the school is to the store?

A. Across the street.

Q. And what kind of school is it? Elementary? High school? Jr. High?

A. Elementary school.

Q. It's an elementary school.

[R.R. at 33; emphasis added]. Not surprisingly, the prosecutor went to great lengths during summation to hammer this terribly prejudicial point home to the jury:

> Where is this sold? Where is it sold? This is sold in a comic book store across the street from an elementary school. Across the street from people who are ages 6 through 12. That is where this is sold. Those are the people who have access to this.
>
> . . .
>
> Comic books, traditionally what we think of, are for kids. This is a store directly across from an elementary school and it is put in a medium, in a forum, to directly appeal to kids. *That is why we are here, ladies and gentlemen.* I want to

> re-emphasize that the fact that all this smut is out there, does not mean it's acceptable and is decent by our community [R.R. at 156; emphasis added].

Appellant submits that the irrelevancy of the proximity of the elementary school was surpassed only by the prejudicial impact of such testimony -- a prejudice which was purposefully exploited by the prosecutor. The harmful error of the admission of such testimony requires reversal of appellant's conviction and remand for a new trial.

Whether evidence may be admitted is a matter left to the discretion of the trial court. Montgomery v. State, 810 S.W.2d 372, 378 (Tex. Crim. App. 1990). A trial court's admission of evidence is reviewed under an abuse of discretion standard. Green v. State, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996), cert. denied, 520 U.S. 1200, 117 S.Ct. 1561 (1997).

The trial court abused its discretion when it permitted the State to introduce testimony concerning the fact that an elementary school was located directly across the street from Keith's Comics. Contrary to the reasoning of the trial court, the fact that the jury is charged with determining the community standard with respect to patent offensiveness and prurience has nothing to do with the location of the alleged offense. The jury is not asked to decide whether a prosecuted work is obscene in light of where it was sold. Rather, the jurors' task is to assess whether the material is beyond constitutional protection pursuant to a prescribed formula, the elements of which do not concern the location of purveyance at all. See, Tex. Penal Code §43.23(c); Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973). Consequently, the fact that an elementary school is located directly across the street from Keith's Comics is of absolutely no relevance. Tex. R. Evid. 401.

The absence of relevancy compels the conclusion that the trial court abused its discretion in ruling that the probative value of such proof outweighed its obvious prejudicial effect. Indeed, the balancing test set forth in Tex. R. Evid. 403 presumes relevance as a foundational factor of the analysis: "*Although relevant*, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence" (emphasis added). This Court has explained that four factors are considered in determining the admissibility of proof under Tex. R. Evid. 403:

> (1) how compellingly the objected-to evidence makes a fact of consequence more or less probable;
>
> (2) the evidence's potential to impress the jury in some irrational but nevertheless indelible way;
>
> (3) the time needed to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and
>
> (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence to help establish this fact, and is this fact related to an issue in dispute.

Fails v. State, 999 S.W.2d 144, 146 (Tex. App. - Dallas 1999), cert. denied, 2001 U.S. Lexis 2991 (2001) (citations omitted).

Under this analysis, appellant's motion *in limine* should have been granted. As noted, the most basic requirement of

relevance is missing. The proximity of the elementary school to Keith's Comics was not a fact related to an issue in dispute and the State had no good faith need for such proof. Moreover, the admission of such testimony was inherently prejudicial, raising issues of pedophilia and harm to the welfare of minors -- considerations completely extraneous to the case, yet imbued with the unavoidable power to indelibly impress the jury with concerns in no way rationally related to the elements of the crime of obscenity.

The prejudicial effect of the trial court's erroneous ruling was further exacerbated by the prosecutor's re-emphasis of the improper theme during argument to the jury. The State effectively advised the jury that the purpose of the prosecution was to prevent the exposure of children to the targeted materials. This was not simply misleading; the improper argument directed the jury onto a path of unfounded speculation and fear at the expense of appellant's fair trial rights. Despite the fact that appellant was not charged with purveying harmful matter to children and despite the absence of any evidence that children were exposed to adult materials, the State urged the jurors to convict appellant of obscenity merely because the comic book store was located near a school: "This is in a store directly across from an elementary school and it is put in a medium, in a forum, to directly appeal to kids. That is why we are here, ladies and gentlemen" [R.R. at 156].

Appellant respectfully requests that this Court make clear to the State that the jury was not there to convict on the basis of innuendo and fear. The improper introduction of irrelevant and highly prejudicial testimony, which formed the basis for such an illegitimate appeal, constituted an abuse of discretion. Accordingly, reversal of appellant's conviction and remand for a new trial are required.

POINT OF ERROR NUMBER SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DETECTIVE REYNERSON'S OPINION THAT "DEMON BEAST INVASION, THE FALLEN" IS OBSCENE

During the course of her direct examination of Detective Reynerson, the prosecutor repeatedly and blatantly attempted to elicit the detective's opinion that "Demon Beast Invasion, the Fallen" was obscene. When the prosecutor first asked, "How do you determine or make an assessment of what is obscene prior to making an arrest?", defense counsel's objection that the question called for a legal conclusion was sustained [R.R. at 30]. When, a short time later, the prosecutor asked Detective Reynerson, "Did you find anything obscene in the store?", trial counsel's objection was again sustained on the basis that the query called for a legal conclusion [R.R. at 34].

Not to be deterred by the trial court's rulings against her, the prosecutor moments later continued this theme: "And you said that you thumbed through the book while you were at the store. *And in your opinion this comic book is obscene.* Why not just make an arrest at that point?" [R.R. at 38; emphasis added]. Defense counsel immediately objected on the ground that the prosecutor had not qualified Detective Reynerson as an expert to give an opinion in that regard and on the ground that the proposed testimony went to an issue of ultimate fact and invaded the province of the jury [R.R. at 38]. The trial court sustained counsel's objection, but overruled his request for an instruction that the prosecutor cease this line of questioning [R.R. at 38-39].

Despite the patently objectionable nature of the questioning and the trial court's repeated rulings against her, the prosecutor again asked Detective Reynerson, "And in your opinion did this

comic book meet the definition of obscenity in your opinion?" [R.R. at 39]. Defense counsel again registered an immediate objection on the ground that the detective was not qualified to give such an opinion [R.R. at 39]. This time, however, the trial court inexplicably overruled the objection and allowed Detective Reynerson to testify that the comic book did, in his opinion, meet the definition of obscenity [R.R. at 39-40].

Curiously, the trial court then sustained trial counsel's objection to the prosecutor's question as to whether, in the detective's opinion, the acts depicted within the comic book were patently offensive to current community standards of decency [R.R. at 40]. However, the trial court followed up that directive with a ruling that the detective would be allowed to state his opinion that the comic book lacked serious literary, artistic, political or scientific value, despite trial counsel's objection that the detective was not qualified to state such an opinion and that such testimony went to an ultimate issue of fact for resolution by the jury [R.R. at 41].

Appellant contends that the trial court abused its discretion in permitting the State to elicit Detective Reynerson's opinion that "Demon Beast Invasion, the Fallen" was obscene, and lacked serious literary, artistic, political or scientific value. Detective Reynerson was not qualified to give such opinions and the rendering of those opinions did not provide the jury with necessary meaningful assistance in performing its fact-finding function.

Whether a witness will be allowed to testify as an expert is a decision left to the sound discretion of the trial court. Duckett v. State, 797 S.W.2d 906, 910 (Tex. Crim. App. 1990), overruled on other grounds, Cohn v. State, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993). This discretion, however, is not boundless. Expert testimony must be helpful to the trier of fact to be admissible. Id. at 914. "Expert testimony assists the trier of fact when the jury is not

qualified to 'the best degree possible' to determine intelligently a particular issue without the help of the testimony. But, the expert testimony must aid -- not supplant -- the jury's decision." Schutz v. State, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997, pet. ref'd), quoting Duckett v. State, supra.

The proponent of the purported expert witness bears the burden of establishing the witness's qualifications. Matson v. State, 819 S.W.2d 839, 851 (Tex. Crim. App. 1991). "Expert testimony is admissible if the witness is competent and qualified to testify, their testimony will assist the jurors in evaluating and understanding matters not within the common experience, and the probative value of the testimony outweighs its prejudicial effect." Beasley v. State, 838 S.W.2d 695 (Tex. App. - Dallas 1992, pet. ref'd), cert. denied, 510 U.S. 969, 114 S.Ct. 451 (1993). Judged by this standard, the trial court abused its discretion in admitting the challenged testimony of Detective Reynerson.

First, the State did not qualify Detective Reynerson as an expert before the jury. In fact, the State acknowledged on the record that it had no expert witnesses to present [R.R. at 24]. Further, the State presented no evidence with respect to Reynerson's educational background and training as it might relate to obscenity. Rather, the prosecution simply brought out that Detective Reynerson was assigned to the Vice Section of the Dallas Police Department and that his duties included making arrests for obscenity offenses [R.R. at 29-30]. The State did not present proof with respect to any level of competence or expertise possessed by Detective Reynerson with respect to the issue of obscenity and its underlying elements (such as contemporary community standards and serious artistic and literary value). Consequently, Detective Reynerson was not properly qualified to render expert witness opinion testimony on obscenity issues.

Moreover, the need for expert testimony with respect to the issue of obscenity has not been established on this record. See, Beasley v. State, supra. In Paris Adult Theatre I, 413 U.S. 49, 93 S.Ct. 2628 (1973), the Supreme Court observed that obscenity "is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. No such assistance is needed by jurors in obscenity cases . . . ." Id. at 56, n.6, 93 S.Ct. at 2634, n.6; see also, T.K.'s Video, Inc. v. State, 871 S.W.2d 522, 524 (Tex. App. - Fort Worth 1994, pet. ref'd). This premise was reiterated by the Court of Criminal Appeals in Buchanan v. State, 506 S.W.2d 236, 238 (Tex. Crim. App. 1974). The record does not demonstrate that the State had a *bona fide* need for Detective Reynerson's opinion testimony. There is no indication in the proceedings below that Detective Reynerson's unsubstantiated and conclusory opinions would have assisted the jury "in evaluating and understanding matters not within their common experience." Beasley v. State, supra.

Finally, the prejudicial effect of Detective Reynerson's conclusory opinion that "Demon Beast Invasion, the Fallen" lacked serious literary, artistic, political or scientific value and, in Detective Reynerson's opinion, was obscene, certainly outweighed any probative value of such proof. Beasley v. State, supra. Not only were Detective Reynerson's opinions without support with respect to the foundations for his opinions, but the jury was not even made aware of a reason to believe that Detective Reynerson was stating anything but his own personal, subjective opinion concerning the comic book. Thus, the challenged testimony simply was not probative in the sense that it filled a gap in the jurors' understanding and assisted them in coming to an intelligent determination of an issue which they would not be able to resolve without the help of Reynerson's testimony. See, Schutz v. State, supra. Thus, the prejudice inherent in the detective's statement that the comic book was obscene was not offset by any legitimate evidentiary purpose.

Moreover, the First Amendment context of this case sets it apart from more common evidentiary matters. When he stated his opinion that the subject comic book was obscene, Detective Reynerson not only expressed his belief that appellant was guilty of the crime of obscenity, he also rendered an opinion that the comic book was beyond the scope of constitutional protection. While the State of Texas has a legitimate interest in prohibiting the promotion of obscene material, Miller v. California, 413 U.S. at 18-19, 93 S.Ct. at 2612, this police power should not be extended to allow a law enforcement official to use the authority of his official position to pronounce from the witness stand both an opinion as to the guilt of the accused and the constitutionally proscribed nature of the speech at issue. While it may be permissible in other circumstances to allow an expert to supplant the jury's decision, see, Schutz v. State, supra, meaningful protection of state and federal constitutional expressive freedoms demands much more.

Appellant, therefore, respectfully requests that this Court find that the trial court abused its discretion in admitting the challenged opinion testimony of Detective Reynerson. Reversal of appellant's conviction and remand for a new trial is warranted.

POINT OF ERROR NUMBER EIGHT

APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS BY THE FAILURE TO RECORD THE PUNISHMENT HEARING

Appellant's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution were violated by the failure to record the punishment hearing despite trial counsel's request.

By motion dated July 12, 2000, appellant requested that a complete record be made of the trial including all testimony, bench conferences and argument of counsel [C.R. at 13]. Counsel's request was repeated on the record at trial [R.R. at 23]. However, the court reporter's notation at the end of the record indicates that the punishment hearing was not recorded [R.R. at 169].

Rule 13.1(e) of the Texas Rules of Appellate Procedure requires a court reporter to perform such acts relating to the reporter's official duties as the trial court directs. Transcription of a punishment hearing should clearly be considered an official duty.

The fact that the punishment hearing was not recorded prevents the appellate court from having a full record of the proceedings, contrary to appellant's request. The failure to record the punishment hearing precludes appellant from establishing the existence of harmful error and prevents the appellate court from fully reviewing whether the sentencing process comported with Texas law. Consequently, appellant contends that his statutory and constitutional rights to due process and an effective appeal have been violated. It is respectfully requested that this Court reverse appellant's conviction and remand for a recorded punishment hearing.

PRAYER

For the foregoing reasons, appellant respectfully prays that the case against him be reversed and a judgment of acquittal be entered by the Court. In the alternative, appellant requests that the case against him be reversed and remanded to the trial court for a new trial *in toto* or for a new punishment hearing.

DATED: April 19, 2001

Respectfully submitted,

By /s/
Roger W. Wilcox, Jr.

Paul J. Cambria, Jr.
Roger W. Wilcox, Jr.
Attorneys at Law
Admitted Pro Hac Vice
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
Ofc: 716-849-1333
Fax: 716-855-1580

By /s/
Paul R. Shunatona by
Roger W. Wilcox, Jr.

Attorney at Law
SBN 18328400
211 North Record, Suite 450
Dallas, Texas 75202
Ofc: 214-747-8844
Fax: 214-742-7313

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to Bill Hill, District Attorney for Dallas County, Texas, via United States Postal Service - Express Mail Delivery, on April 19, 2001.

/s/
Roger W. Wilcox, Jr.

The State Requests Oral Argument

NO. 05-00-01522-CR

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

JESUS A. CASTILLO, JR.,
APPELLANT

vs.

THE STATE OF TEXAS,
APPELLEE

On appeal from the County Criminal Court No. 8
of Dallas County, Texas
in Cause No. MA 99- 72 789-J

STATE'S BRIEF

Counsel of Record:

BILL HILL
CRIMINAL DISTRICT
ATTORNEY
DALLAS COUNTY, TEXAS

KAREN R. WISE
ASSISTANT DISTRICT
ATTORNEY
STATE BAR NO. 21810200
FRANK CROWLEY COURTS BLDG.
133 N. INDUSTRIAL BLVD., LB-19
DALLAS, TEXAS 75207-4399
(214) 653-3637

(214) 653-3643 *fax*
Attorneys for the State of Texas

TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

RESPONSE TO POINT OF ERROR 1 2

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THE STATE PROVED THAT APPELLANT KNEW THE CONTENT AND CHARACTER OF THE COMIC BOOK HE SOLD TO THE OFFICER

RESPONSE TO POINT OF ERROR 3 10

THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THE STATE PROVED THAT APPELLANT KNEW THE CONTENT AND CHARACTER OF THE COMIC BOOK HE SOLD TO THE OFFICER

RESPONSE TO POINTS OF ERROR 2 & 4 14

THE STATE PRESENTED LEGALLY AND FACTUALLY SUFFICIENT EVIDENCE TO PROVE THAT APPELLANT COMMITTED THIS OFFENSE BY SELLING THE SPECIFIC COMIC BOOK ALLEGED IN THE INFORMATION; NO EVIDENCE REGARDING THE SERIES OF COMIC BOOKS WAS NEEDED SINCE

APPELLANT WAS ONLY CHARGED WITH SELLING A SINGLE COMIC BOOK

RESPONSE TO POINT OF ERROR 5 18

THIS COURT SHOULD FIND THAT ISSUE 2 OF "DEMON BEAST INVASION, THE FALLEN" IS CONSTITUTIONALLY OBSCENE

RESPONSE TO POINT OF ERROR 6 19

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY THAT AN ELEMENTARY SCHOOL WAS NEAR THE COMIC BOOK STORE; MOREOVER, ANY ERROR WAS HARMLESS

RESPONSE TO POINT OF ERROR 7 24

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DETECTIVE REYNERSON'S TESTIMONY THAT THE COMIC BOOK WAS OBSCENE

RESPONSE TO POINT OF ERROR 8 27

ANY ERROR CAUSED BY THE COURT REPORTER'S FAILURE TO RECORD THE PUNISHMENT PHASE OF THE TRIAL WAS WAIVED BY APPELLANT'S FAILURE TO OBJECT; MOREOVER, ANY ERROR WAS HARMLESS

PRAYER 32

CERTIFICATE OF SERVICE..... 32

INDEX OF AUTHORITIES

Cases

Abor v. State,
677 S.W.2d 560 (Tex. App.-Eastland 1984, pet. ref'd) 7

Andrews v. State,
652 S.W.2d 370 (Tex. Crim. App. 1983)..... 19

Austin v. State,
794 S.W.2d 408 (Tex. App.-Austin 1990, pet. ref d)..... 26

Barton v. State,
882 S.W.2d 456 (Tex. App.-Dallas 1994, no pet.)..... 6

Beier v. State,
681 S.W.2d 124 (Tex. App.-Houston [14th Dist.] 1984),
reversed on other grounds, 687 S.W.2d 2 (Tex. Crim.
App. 1985)..... 13

Cain v. State,
958 S.W.2d 404 (Tex. Crim. App. 1997)..... 12, 14

Carlsen v. State,
654 S.W.2d 444 (Tex. Crim. App. 1983) (opinion on
rehearing), overruled on other grounds, Geesa v. State,
820 S.W.2d 154 (Tex. Crim. App. 1991)..... 5

Carroll v. State,
701 S.W.2d 913 (Tex. Crim. App. 1986)..... 8, 9

Clewis v. State,
922 S.W.2d 126 (Tex. Crim. App. 1996)..... 12

Cole v. State,
757 S.W.2d 864 (Tex. App.-Texarkana 1988, pet. ref d) 29

Cole v. State,
931 S.W.2d 578 (Tex. App.-Dallas 1995, pet. ref d) 29

Davis v. State,
658 S.W.2d 572 (Tex. Crim. App. 1983) 19

De Los Santos v. State,
918 S.W.2d 565 (Tex. App.-San Antonio 1996, no pet.) 13

Denham v. State,
574 S.W.2d 129 (Tex. Crim. App. 1978) 27

Esquivel v. State,
595 S.W.2d 516 (Tex. Crim. App. 1980),
cert. denied, 449 U.S. 986 (1980) 29

Goocher v. State,
633 S.W.2d 860 (Tex. Crim. App. 1982),
appeal dismissed, 459 U.S. 807 (1982) 16, 17

Green v. State,
682 S.W.2d 271 (Tex. Crim. App. 1984),
cert. denied, 470 U.S. 1034 (1985) 29

Hudson v. State,
675 S.W.2d 507 (Tex. Crim. App. 1984) 27

Isaac v. State,
989 S.W.2d 754 (Tex. Crim. App. 1999) 30, 31

Jackson v. Virginia,
443 U.S. 307 (1979) 5

Johnson v. State,
23 S.W.3d 1 (Tex. Crim. App. 2000) 12, 14

Johnson v. State,
760 S.W.2d 797 (Tex. App.-Dallas 1988, no pet.) 7

King v. State,
953 S.W.2d 266 (Tex. Crim. App. 1997) 23

Mendoza v. State,
552 S.W.2d 444 (Tex. Crim. App. 1977) 29

Miller v. California,
413 U.S. 15, 93 S.Ct. 2607,
37 L.Ed.2d 419 (1973) 17

Montez v. State,
975 S.W.2d 370 (Tex. App.-Dallas 1998, no pet.) 23

Montgomery v. State,
810 S.W.2d 372 (Tex. Crim. App. 1990) 21, 26

Nelson v. State,
607 S.W.2d 554 (Tex. Crim. App. 1980) 29

Purtell v. State,
761 S.W.2d 360 (Tex. Crim. App. 1988),
cert. denied, 490 U.S. 1059 (1989) 29

Reid v. State,
749 S.W.2d 903 (Tex. App.-Dallas 1988, pet. ref d) 26

Rogers v. State,
640 S.W.2d 248 (Tex. Crim. App. 1982) 29

Roth v. United States,
354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) 17

Scott v. State,
934 S.W.2d 396 (Tex. App.-Dallas 1996, no pet.) 12

Staten v. State,
686 S.W.2d 268 (Tex. App.-Houston [14th Dist.]
1985, no pet.) 8

Stogsdill v. State,
552 S.W.2d 481 (Tex. Crim. App. 1977) 5

T.K. Video, Inc. v. State,
883 S.W.2d 300 (Tex. App.-Fort Worth
1994, pet. ref'd) 22

Townsend v. State,
949 S.W.2d 24 (Tex. App.-San Antonio 1997, no pet.) 13

Vela v. State,
516 S.W.2d 176 (Tex. Crim. App. 1974) 27

Statutes

TEX. PENAL CODE ANN. § 43.21(a)
(Vernon 1994) 16, 17, 18

TEX. PENAL CODE ANN. § 43.21(a)(1)(A)
(Vernon 1994) 21

Rules

TEX. R. APP. P. 33.1(a) 28

TEX. R APP. P. 34.6(f) 30

TEX. R APP. P. 44.2(b) 22, 23, 24

TEX. R CRIM. EVID. 701 26

TEX R EVID. 401 21

TEX R EVID. 403 21

Other Authorities

Acts 1975, 64th Leg., R.S., ch. 163, § 1, 1975
Tex Gen Laws 372 (amended 1979, 1994) 17

TO THE HONORABLE COURT OF APPEALS:

The State of Texas submits this brief in reply to the brief of Appellant

STATEMENT OF THE CASE

After pleading not guilty, Appellant was convicted by a jury of promotion of obscenity. The court set punishment at 180 days confinement in the Dallas County Jail, probated for 12 months, and a fine of $4,000. (CR 1: 3 8).

SUMMARY OF ARGUMENT

The evidence is legally and factually sufficient to support the conviction because the State proved that Appellant knew the

content and character of the comic book he sold to the officer. Because Appellant was only charged with promoting obscenity by selling a single comic book, the evidence was not rendered insufficient when the State did not present evidence regarding the entire series of comic books. This Court should find that "Demon Beast Invasion, The Fallen #2" is constitutionally obscene. The trial court did not abuse its discretion in admitting testimony that an elementary school was near the comic book store, since the neighborhood around the store was part of the community to be considered in determining contemporary community standards. The trial court did not abuse its discretion in admitting Detective Reynerson's testimony as a lay witness that, in his opinion, the comic book was obscene. Any error caused by the court reporter's failure to record the punishment phase of trial was waived by Appellant's failure to object; moreover, any error was harmless since the missing portion of the record was not relevant to the appeal's resolution.

ARGUMENT

RESPONSE TO POINT OF ERROR I

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THE STATE PROVED THAT APPELLANT KNEW THE CONTENT AND CHARACTER OF THE COMIC BOOK HE SOLD TO THE OFFICER.

Appellant claims that the evidence is legally insufficient to prove he knew the sexually explicit content and character of the comic book. The State responds that the evidence is sufficient to prove that Appellant knew the content and character of the material he sold to the officer.

Relevant Facts

Dallas Police Officer Craig Reynerson testified that he went to Keith's Comics at 5736 East Mockingbird Lane on September 22, 1999, in response to a citizen complaint, to see if there was obscene material being sold in the store. (RR1: 31-33). The store is in an area combining commercial and residential areas, with an elementary school across the street. (RR1: 33). Most of the comic books in the store were of the action fantasy type, such as Batman, but there were about three shelves of obscene comic books in the back of the store. (RR1: 34-35). There was no doorway or anything else limiting access to these comic books, although there was a sign saying "No one under 18 allowed past this point." (RR1: 35,48). Detective Reynerson identified State's Exhibit No. 1 as the comic book he purchased, titled "Demon Beast Invasion, the Fallen," which was admitted into evidence. (RR1: 35-36,43). The cover of the comic book had a drawing of a nude woman and the words, "Absolutely Not For Children." (RR1: 36). Detective Reynerson took this book to the counter, handed it to Appellant with the front cover up and the price on the front cover, then gave Appellant money for the book. (RR1: 37-38). Detective Reynerson believed that a person selling books should be familiar with the type of material he is selling. (RRl: 53). The statement on the front cover, "Absolutely Not For Children," would tell a viewer that children should not look at it because it is obscene. (RR: 56).

Detective Reynerson took the comic book back to his office, compared it to other obscene material, and filed a prosecution report. (RR1: 39). In Detective Reynerson's opinion, this comic book met the definition of obscenity because of the sexual contact depicted in it. (RR1: 39-40). The book contained acts, of sexual intercourse, oral sodomy, masturbation, excretory functions, sadism, masochism, and lewd exhibition of genitals. (RR1: 40,42). Detective Reynerson looked at the comic book from

front to back and, in his opinion, it had no literary, scientific, artistic, or political value. (RR1: 41-42).

Defense witness Susan Napier, an associate professor of Asian Studies, had done studies on Japanese comic books. (RR1: 97). Napier read the series of comic books titled "Demon Beast Invasion, the Fallen." (RR1: 98). Comic books like this are prevalent in Texas and available in Dallas. (RR1: 118).

Defense witness Michael Christopher, a private investigator, bought a Penthouse magazine that shows penetration of a vagina by a penis, ejaculation, and oral sex. (RR1: 119-22). Christopher bought the Penthouse at a convenience store near SMU, about 7/10 of a mile from Keith's Comics. (RR1: 122-23). The Penthouse had a cover on it so a kid could not just walk in and look at it. (RR1: 130). Christopher also bought some sexually explicit magazines at an adult "boutique" which sold videos, toys, and clothing; the store had a sign saying "no one allowed under 18." (RR1: 123, 131). One magazine showed women using dildos and fondling themselves. (RR1: 124-25). Another magazine showed oral sex, anal sex, and penetration. (RR1: 125). Christopher bought another magazine at 1825 Market Center at XXX Adult Video, which did not allow people under 18 in the store; the magazine contained mostly lesbian activity with some leather and bondage. (RR1: 128, 132-33). These sorts of materials are prevalent in Texas and are sold all over the place. (RR1: 129).

Appellant testified that he was a manager at Keith's Comics and sold mostly to adults. (RR1: 134). There was a section in the back of the store with violent comic books and "mature theme" comic books; the section is clearly marked and children were not allowed back there. (RR1: 135). Appellant had stopped a child trying to go back there. (RR1: 136). Appellant would not sell a violent or adult-theme book to a child. (RR1: 136). Appellant remembered selling this comic book. (RR1: 137). When the

customer specifically asked for "Demon Beast," Appellant said he thought they were sold out because it had come out in 1998 or 1999. (RR1: 137). About five minutes later, the customer gave the comic book to Appellant, who rang it up. (RR1: 138). The customer did not ask Appellant what was in the book. (RR1: 138). Appellant remembered seeing the cover of the book and reading "Demon Beast," but did not see the woman on the cover or the note that it had adult content. (RR1: 138). Appellant had seen the book before but did not look inside it, although he had seen the cover before and knew it was in the adult section. (RR1: 138-40). Appellant admitted that the comic book that said "Absolutely Not For Children" were in the adult section and said that because of the sexually explicit nature of the books. (RR1: 140).

The Evidence Is Legally Sufficient

The above evidence was legally sufficient to prove that Appellant had knowledge of the content and character of the comic book in question at the time of the offense. When a claim is made that the evidence is legally sufficient, this Court's standard of review is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Marroquin v. State, 746 S.W.2d 747, 750 (Tex. Crim. App. 1988). The standard of review is the same in both direct and circumstantial evidence cases, Carlsen v. State, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983) (opinion on rehearing), overruled on other grounds, Geesa v. State, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991). In circumstantial evidence cases, it is not necessary that every fact point directly and independently to the guilt of the accused, as long as the combined and cumulative force of all the incriminating circumstances supports the conclusion of guilt. Stogsdill v. State, 552 S.W.2d 481, 486 (Tex. Crim. App. 1977). In sufficiency reviews of either direct or circumstantial evidence, the reviewing court does not

consider whether the evidence eliminates all reasonable hypotheses other than guilt, and does not disregard reasonable inferences that can be drawn from the evidence. Barton v. State, 882 S.W.2d 456, 459 (Tex. App.-Dallas t 994, no pet.).

The evidence in this case established that Appellant worked as a manager Keith's Comics, which had a section in the back of the store with violent comic books and mature theme comic books. (RR1: 134-35). Appellant claimed that he had previously stopped a child from going into the adult section of the store and that he would not sell an adult theme comic book to a child. (RR1: 135-36). Appellant remembered talking to a customer, Detective Reynerson, who went to the adult section and specifically asked for the "Demon Beast" comic book; Appellant said he thought the comic was sold out because it was a few years old. (RR1: 137). Detective Reynerson then brought the book to him and Appellant rang up the sale. (RR1: 138). Appellant admitted seeing the cover of the comic book as he sold it, but denied seeing the nude woman on the cover or the notation on the cover that it was not for children. (RR1: 138). Appellant admitted that he had seen the cover of this comic book before and knew it was in the adult section of the store. (RR1: 140). Appellant admitted that the comic books that said "Absolutely Not For Children" were in the adult section and said that because of the sexually explicit nature of the books. (RR1: 140).

Detective Reynerson purchased the comic book, titled "Demon Beast Invasion, the Fallen," from Appellant who was the seller behind the counter. (RR1: 35-37). The cover of this comic book had a drawing of a nude woman and the words, "Absolutely Not For Children." (RR1: 36). Detective Reynerson took this book to the counter, handed it to Appellant with the front cover up and the price on the front cover, then gave Appellant money for the book. (RR1. 37-38).

The State submits that this combined evidence was sufficient to prove that Appellant knew the content and character of the comic book in question, especially since a glance at the cover makes the content and character of the comic book clear to anyone. In Johnson v. State, 760 S.W.2d 797, 799 (Tex. App.-Dallas 1988, no pet.), this Court considered and rejected a claim similar to Appellant's and stated the following:

> Johnson argues that the only contact he had with the magazine was seeing the price of the magazine. Johnson contends that the only evidence the State produced is that, perhaps, he viewed the magazine cover, and the cover alone would not convey the knowledge that the magazine was obscene.
>
> In judging the sufficiency of the evidence, the record is reviewed in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Skinner v. State, 652 S.W.2d 773, 776 (Tex. Crim. App. 1983). The evidence in the record demonstrates that a rational jury could find Johnson guilty of promoting obscenity beyond a reasonable doubt.
>
> The relevant evidence in the case is: (1) opaque windows in the front of the building and the sign, "If nudity offends you, do not enter;" (2) no general subscription magazines in the store, such as Time or Newsweek, or even The National Enquirer; (3) the fact that Johnson appeared to be in sole and exclusive control of the store; and (4) the magazine in question was wrapped in clear cellophane and was on a shelf in clear view of Johnson. While no one of these elements is adequate to convict, their combination with the depictions on the magazine's cover and Johnson's' opportunity to view it, are more than sufficient to find

> Johnson guilty of promotion of obscenity. See Smith v. California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (1959); Carroll v. State, 701 S.W.2d 913, 915 (Tex. Crim. App. 1986). Johnson's third point of error is overruled.

760 S.W.2d at 800.

An almost identical contention was also raised by the defendant and rejected in Abor v. State, 677 S.W.2d 560 (Tex. App.-Eastland 1984, pet. ref d). In Abor, the defendant sold a police officer a video titled "Cocky Cruisin'," which contained a large picture of two naked People engaged in oral sodomy. Id. at 561. The Bastland court in Abor held, "A rational jury could reasonably infer, from appellant's presence in that back room and from her looking at the carton in question when she made change, that she knew the content and character of the obscene video cassette which she sold to the undercover police officer." 677 S.W.2d at 561.

Similarly, in Staten v. State, 686 S.W.2d 268, 270 (Tex. App.-Houston [14th Dist.] 1985, no pet), the defendant claimed that there was insufficient evidence to prove he knew the content and character of the magazine in question. The Houston Court of Appeals stated the following:

> We believe the evidence was adequate to convict. The United States Supreme Court has ruled, "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of the contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." Smith v. California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (1959). The circumstances in the present case are sufficient to allow a reasonable jury to infer

> that appellant was aware of the nature of the business and that he knew the content and character of the magazine. See also Beier v. State, 681 S.W.2d 124 (Tex. App. - Houston, April 12, 1984, pet. granted).
>
> Although Shealy says one may not judge a book by its cover, surely the covers of such a magazine and a defendant's opportunity to view them are still elements of evidence which, when combined with other relevant evidence, would allow a jury to convict beyond a reasonable doubt.

Staten, 686 S.W.2d at 270.

In Carroll v. State, 701 S.W.2d 913, 914 (Tex. Crim. App. 1986), the Court of Criminal Appeals ruled that the State is not required to prove that a defendant has knowledge of content and character by direct evidence alone. The Court held the following:

> Eyewitness testimony of a vendor's perusal of the contents of a magazine or a book is not an absolute necessary element in proving that the vendor knew the character and content of the books or magazines he sells. Circumstantial evidence may justify a finding that the vendor knows that the character and content of a magazine or book is obscene. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); Staten v. State, 686 S.W.2d 268 (Tex. App.-Houston [14th), 1985). We do not hold that any one particular kind of evidence is required to establish knowledge of the material's character and content.

Carroll, 701 S.W.2d at 914.

In the instant case, Appellant was a manager in a comic book store with an adult section, talked to Detective Reynerson in

that adult section about a specific comic book from that section, and told Detective Reynerson he thought the book was sold out. Appellant admits selling the comic book in question to the detective after the detective located it. Although at the time of sale Appellant denied seeing the nude woman on the comic book's cover or the notation on the cover that it was not for children, Appellant admitted that he had seen the cover of this comic book before and knew it was in the adult section of the store. (RR1: 138, 140). Appellant admitted that the comic books that said "Absolutely Not For Children" were in the adult section and carried that warning because of the sexually explicit nature of the books. (RR1: 140). Appellant knew of the adult section of the store, kept children out of the area, and refused to sell comic books from that area to children. Given Appellant's knowledge of sexually explicit material carried in the adult section of the store, his specific admission that he had seen the cover of this comic book and knew it was carried in the adult section, and his specific admission that he sold the comic book to Detective Reynerson, the evidence is legally sufficient to prove that Appellant knew the content and character of the comic book he sold to Officer Reynerson. Therefore, the evidence is legally sufficient to support the conviction. This point of error is without merit and should be overruled.

RESPONSE TO POINT OF ERROR 3

THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THE STATE PROVED THAT APPELLANT KNEW THE CONTENT AND CHARACTER OF THE COMIC BOOK HE SOLD TO THE OFFICER.

Appellant claims that the evidence is factually insufficient to prove he knew the sexually explicit content and character of the comic book. Appellant also claims the evidence is insufficient to prove that the comic book lacks the requisite serious literary,

artistic, political, or scientific value. The State responds that the evidence is sufficient to' prove that Appellant knew the content and character of the obscene material he sold to the officer. The evidence is also sufficient to prove that this particular comic book lacks serious literary, artistic, political, or scientific value.

Relevant Facts

In Detective Reynerson's opinion, this comic book met the definition of obscenity because of the sexual contact depicted in it. (RR1: 39-40). The book contained acts of sexual intercourse, oral sodomy, masturbation, excretory functions, sadism, masochism, and lewd exhibition of genitals. (RR1: 40,42). In Detective Reynerson's opinion, the acts depicted in the book appealed to a prurient interest in sex (RR1: 41). Detective Reynerson looked at the comic book from front to back and, in his opinion, it had no literary, scientific, artistic, or political value. (RR1: 41-42).

Defense witness Scott McCloud, a comic book artist and writer, testified that he had read "Demon Beast Invasion, the Fallen, Issue No. 2" and had also read the other issues in the series. (RR1: 65-66,75). The story was "very sexually potent in places." (RR1: 77). Reviewing this series did not give McCloud a shameful or morbid interest in sex; he did not find this comic book sexually arousing at all. (RR1: 95). In McCloud's opinion, the comic book had serious literary value. (RR 1: 78). McCloud agreed that the male character implied that he was going to have sex with his own daughter and that a tree had sex with women. (RR1: 81-84). McCloud believed that the comic book was deeply disturbing to most readers and was meant to be disturbing. (RR1.: 84-85). McCloud agreed that the comic book showed a woman performing oral sex on a man she just met. (RR1: 88-89). McCloud agreed that most of issue 2 is "basically sex." (RR1: 91).

Defense witness Susan Napier, an associate professor of Asian Studies, had done studies on Japanese comic books. (RR1: 97). Napier read the series of comic books titled "Demon Beast Invasion, the Fallen." (RR1: 98). The entire story involves demons trying to impregnate human women so they can create their own race of demons to take over the world. (RR1: 99). There was also a video series of this story line. (RR1: 113). Napier did not have a shameful or morbid interest in sex from viewing this comic book. (RR1: 114). This comic book had literary and artistic value. (RR1: 114). Comic books like this are prevalent in Texas and available in Dallas. (RR1: 118).

The Evidence Is Factually Sufficient

When considering a factual sufficiency claim, this Court reviews the evidence that both supports and contradicts the elements challenged on appeal and sets aside the verdict only if it is so contrary to the great weight of the evidence as to be clearly wrong and unjust. Clewis v. State, 922 S.W.2d. 126, 129 (Tex. Crim. App. 1996); Scott v. State, 934 S.W.2d 396, 398-99 (Tex. App.-Dallas 1996, no pet.). To conduct a factual sufficiency review of the elements of a criminal offense, the reviewing court asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or demonstrates that the proof of guilt is greatly outweighed by contrary proof. Johnson v. State, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). In such a review, the appellate court must show deference to the factfinder's findings because the trier of fact is the sole judge of the facts. Cain v. State, 958 S.W.2d 404,407 (Tex. Crim. App. 1997). "A court of appeals may not reverse a jury's decision simply because it disagrees with the result; the appellate court must defer to jury findings, and may find the evidence factually insufficient only where necessary to prevent manifest injustice." Id. In a factual sufficiency review, an appellate must review the factfinder's

weighing of the evidence, and is authorized to disagree with the factfinder's determination; however, this review must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the factfinder. Johnson, 23 S.W.3d at 7. Any evaluation of the evidence "should not substantially intrude" upon the factfinder's role as the sole judge of the weight and credibility given to witness testimony. Id.

There was ample evidence to prove that Appellant committed the offense. Although there is conflicting evidence as to whether Appellant knew the content and character of the comic book, the self-serving testimony of Appellant cannot be classified as overwhelming the testimony of the State's witness, especially since Appellant admitted he was familiar with the comic book and knew it was in the adult section.

Moreover, the testimony of defense experts regarding the supposed artistic and scientific value of the comic book does not render the verdict against the great weight and preponderance of the evidence. The jury was merely presented with differing opinions regarding the value of the comic book. The fact that certain people did not find the material to be obscene would not prevent the jury from deciding it would be offensive to the average member of the community. Beier v. State, 681 S.W.2d 124, 127. (Tex. App.- Houston [14th Dist.] 1984), reversed on other grounds, 687 S.W.2d 2 (Tex. Crim. App. 1985). As the fact finder, the jury was entitled to resolve any inconsistencies in the evidence against Appellant. See Townsend v. State, 949 S.W.2d 24, 27-28 (Tex. App.- San Antonio 1997, no pet.) (evidence not rendered factually insufficient by mere fact that accused offered alibi witnesses and that the credibility of the complainant and her mother was attacked at trial); De Los Santos v. State, 918 S.W.2d 565,569 (Tex. App.-San Antonio 1996, no pet.) (evidence factually sufficient to support accused's murder conviction despite presentation of evidence supporting alibi and mistaken identity defenses as well as

attacks on credibility of eyewitness testimony). The jury obviously found the officer's view of this comic book to be credible. Under either a legal or factual sufficiency review, the factfinder's determination as to credibility is entitled to deference and may not be disturbed on appeal. Cain, 958 S.W.2d at 409-10.

The jury's verdict in this case is not contrary to the overwhelming weight of the evidence. An appellate court may not substantially intrude upon the factfinder's right to accept or reject the testimony of any witness in the case. Johnson, 23 S.W.3d at 7. This is not a case where the verdict shocks the conscience or clearly shows bias. The defensive evidence was simply not persuasive and did not overcome the State's evidence. Consequently, the evidence is factually sufficient to prove that Appellant knew the content and character of the comic book he sold to Detective Reynerson, and that the comic book lacked serious literary, artistic, scientific, or political value. Thus, the evidence is factually sufficient to support Appellant's conviction. This point of error is without merit and should be overruled.

RESPONSE TO POINTS OF ERROR 2 & 4

THE STATE PRESENTED LEGALLY AND FACTUALLY SUFFICIENT EVIDENCE TO PROVE THAT APPELLANT COMMITTED THIS OFFENSE BY SELLING THE SPECIFIC COMIC BOOK ALLEGED IN THE INFORMATION; NO EVIDENCE REGARDING THE SERIES OF COMIC BOOKS WAS NEEDED SINCE APPELLANT WAS ONLY CHARGED WITH SELLING A SINGLE COMIC BOOK.

In his second and fourth points of error, Appellant claims that the evidence is legally and factually insufficient to support the conviction because the State failed to present evidence concerning

the content and character of all four volumes of the "Demon Beast Invasion, The Fallen" series. The State responds that it presented evidence that was both legally and factually sufficient to prove that Appellant committed this offense by selling the specific comic book alleged in the information. Because Appellant was only prosecuted for selling a single comic book, no evidence regarding the remainder of the series of comic books was needed.

Relevant Facts

Appellant was charged with promoting obscenity by selling a comic book titled "Demon Beast Invasion: The Fallen #2" to Detective Reynerson while knowing the content and character of the material. (CR1: 6). As discussed in Response 1, the State proved that Appellant knew the content and character of "Demon Beast Invasion: The Fallen #2," the comic book he sold to Officer Reynerson. The comic book in question was Issue 2 in a series; Detective Reynerson did not buy Issues 1, 3, or 4 of the series. (RR1: 50). The comic book was sold individually and Detective Reynerson did not see any other issues in the series. (RR1: 58). In obscene videotape cases, Detective Reynerson would also only purchase one videotape at a time for a prosecution, even if the videotape came in different volumes, because each had to be judged on its own value rather than as a whole series. (RR1: 57).

Defense witness Scott McCloud, a comic book artist and writer, testified that he had read "Demon Beast Invasion, the Fallen, Issue No. 2" and had also read the other issues in the series. (RR1: 65-66,75). The series was part of a genre of Japanese horror and death and the alien infiltration of earth culture. (RR1: 76).

Defense witness Susan Napier, an associate professor of Asian Studies, had done studies on Japanese comic books. (RR1: 97). Napier read the series of comic books titled "Demon Beast Invasion, the Fallen." (RR 1: 98). The entire story involved demons

trying to impregnate human women so they could create their own race of demons to take over the world. (RR1: 99). There was also a video series of this story line. (RR1: 113).

State Presented Sufficient Evidence To Prove Obscenity

TEX. PENAL CODE ANN. § 43.21(a) (Vernon 1994) defines the term "obscene" as material or a performance that:

> (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
> (B) depicts or describes:
> (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
> (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
> (C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

Appellant argues that since issue 2 of "Demon Beast Invasion" was part of a series, the State should have been required to present evidence of the content and character of the entire series so that the obscene material could be considered as a whole. Appellant is incorrect, since he was charged with promotion of obscenity by selling only one comic book, not a series of comic books.

A similar argument was rejected by the Court of Criminal Appeals in Goocher v. State, 633 S.W.2d 860, 862-63 (Tex. Crim. App. 1982), appeal dismissed, 459 U.S. 807 (1982). In Goocher, the defendant was convicted of commercially exhibiting obscene materials for showing two obscene movies at her drive-in theater. Id. at 861-62. The defendant contended that the evidence was insufficient because the State's evidence failed to show the whole of the material, since three films were shown together at the drive-in for a single price but only two films were shown to the jury for its determination of obscenity. Id. The Court of Criminal Appeals acknowledged the decisions by the United States Supreme Court in Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1 L.Ed.2d 1498, 1509 (1957) and Miller v. California, 413 U.S. 15,24, 93 S.Ct. 2607, 37 L.Ed.2d 419, 430-31 (1973) that obscene material must be "taken as a whole." Goocher, 633 S.W.2d at 862. The Court of Criminal Appeals noted that "isolated excerpts" cannot be a basis for a finding of obscenity. Id. The Court then determined that each motion picture or "single book" is considered a "unit of perception" so that a fact finder must see the entire motion picture or consider the entire book in making a finding of obscenity. Id. at 863. The Court concluded that the State was only required to present evidence to sustain the allegations contained in the information. Id. Because the defendant was not charged with exhibiting the third film, it was "neither relevant nor material" to any issue in the trial. Id.

The obscenity statute being considered at the time of the Goocher decision defined obscenity as material "...having as a whole a dominant theme" that, among other things, appeals to a prurient interest or depicts or describes sexual conduct in a patently offense way. 633 S.W.2d at 862, citing former TEX. PENAL CODE ANN. § 43.21 *(See* Acts 1975, 64th Leg., R.S., ch. 163, § 1, 1975 Tex. Gen. Laws 372 (amended 1979, 1994)). In the most recent version of § 43.21, under which Appellant was prosecuted, the "theme" of the material is no longer part of the statutory

language in determining obscenity; instead, the material must be taken as a whole. TEX. PENAL CODE ANN. § 43.21(a). Thus, the "theme" of the obscene material is even less important now than it was when Goocher was decided. Therefore, Appellant's argument about the thematic content of the comic book, and the necessity of presenting evidence regarding the entire series to show that content, simply has no validity.

In the instant case, as in Goocher, the State was only required to present evidence to sustain the allegations contained in the information, which only involved the comic book titled "Demon Beast Invasion: The Fallen #2." Because Appellant was not charged with promoting obscenity by selling the other volumes in the series, the character and content of the remainder of the series was not relevant or material to Appellant's case. Therefore, the evidence was not rendered legally or factually insufficient by the State's failure to present evidence of the content of volumes 1, 3, or 4 of "Demon Beast Invasion: The Fallen." These points of error are without merit and should be overruled.

RESPONSE TO POINT OF ERROR 5

THIS COURT SHOULD FIND THAT ISSUE 2 OF "DEMON BEAST INVASION, THE FALLEN" IS CONSTITUTIONALLY OBSCENE.

Appellant asks this Court to make an independent determination that the comic book is not constitutionally obscene. The State requests that this Court determine that Issue 2 of "Demon Beast Invasion, The Fallen" is constitutionally obscene.

When a defendant challenges the constitutional or factual obscenity of material at trial or on appeal, an appellate court is required to make an independent determination of whether the material is factually or constitutionally obscene. Davis v. State, 658

S.W.2d 572, 581 (Tex. Crim. App. 1983); Andrews v. State, 652 S.W.2d 370, 383 (Tex. Crim. App. 1983). In the instant case, after making an independent review of the comic book in question, this Court will be able to determine that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest. This Court will be able to determine that the comic book depicts or describes patently offensive representations of sexual intercourse, oral sodomy, bestiality, masturbation, sadism, masochism, and lewd exhibition of genitals. This Court will be able to determine that this comic book, taken as a whole, lacks serious literary, artistic, political, or scientific value. Therefore, this Court should determine that Issue 2 of "Demon Beast Invasion, The Fallen" is constitutionally obscene. See Andrews, 652 S.W.2d at 384.

RESPONSE TO POINT OF ERROR 6

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY THAT AN ELEMENTARY SCHOOL WAS NEAR THE COMIC BOOK STORE; MOREOVER, ANY ERROR WAS HARMLESS.

Appellant claims that the court abused its discretion by admitting testimony from Detective Reynerson that Keith's Comics was near an elementary school. The State responds that the trial court did not abuse its discretion in admitting this testimony because it was relevant to the issue of contemporary community standards. Moreover, any error was harmless.

Prior to trial, Appellant filed a motion in limine to prevent the State from producing evidence that Keith's Comics was located in close proximity to a school. (RR1: 6).[1] Appellant argued that the location of the comic book store was of no consequence and that information regarding the elementary school would be more

prejudicial than probative. (RR1: 6-7). The trial court ruled that since the jury had to determine the contemporary community standards, the location of the store was "simply a fact as to where this is in the community." (RR1: 7). The court ruled that the State would be allowed to describe the location in fact-based testimony with no more than one or two questions. (RR1: 7). During direct examination, Detective Reynerson testified that he went to Keith's Comics to see if there was any obscenity being sold in the store. (RR1: 32-33). The following information was then elicited:

---

[1] The written motion in limine is not contained in the appellate record.

> Q. Okay. And can you describe the neighborhood in which the store is located?
>
> A. It's a combination of commercial and residential neighborhood, strip shopping center, and a school right in the immediate vicinity.
>
> Q. How close would you say the school is to the store?
>
> A. Across the street.
>
> Q. And what kind of school is it? Elementary? High School? Jr. High?
>
> A. Elementary school.
>
> Q. It's an elementary (RR 1: 33).

(RR1: 33).

The Evidence Was Properly Admitted

In Montgomery v. State, 810 S.W.2d 372,379-80 (Tex. Crim. App. 1990), the Court of Criminal Appeals determined that a trial court should be allowed the discretion to exclude or admit evidence before the jury, and an appellate court should not set aside the trial court's ruling absent a showing on the record that the trial court abused its discretion by acting in an arbitrary and unreasonable manner. The Court specifically noted that there should be reluctance on the part of an appellate court to reverse trial court decisions that admit or exclude evidence. Id. at 378. The Court also noted that the fact that a trial judge may decide a matter within his discretion in a different manner than an appellate judge does not demonstrate that an abuse of discretion has occurred. Id. at 386. -

TEX. R. EVID. 401 provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the case more probable or less probable. TEX. R. EVID. 403 then provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

In determining whether particular material is obscene, TEX. PENAL CODE ANN. §43.21(a)(1)(A) (Vernon 1994) requires the jury to apply contemporary community standards. Under both state and federal law, the jurors are permitted to draw upon their knowledge of the community in determining whether the average person, applying contemporary community standards, would find the materials in question to be obscene. T.K. Video, Inc. v. State, 883 S.W.2d 300, 301-2 (Tex. App.-Fort Worth 1994, pet. ref d). While the "community" to be used in determining the community standards is certainly larger than the neighborhood surrounding the store, the fact that the store was near a school was

something to be considered in determining the community standards. Thus, the trial court did not err in allowing admission of evidence that Keith's Comics was near an elementary school because such evidence was relevant to the determination of contemporary community standards.

This evidence was also admissible because it was not more prejudicial than probative. Appellant argues that the evidence was prejudicial because it raised issues of pedophilia and the consequent harm to minors. However, there was no mention of pedophilia in this case. Appellant was charged only with selling obscene material, not with sexually abusing children. The fact that a school was near the comic book store merely raised the issue that minors would be in the store where obscene material was, displayed and for sale. This fact was probative in determining contemporary community standards. Because the evidence was more probative than prejudicial, it was properly admitted.

Any Error Was Harmless

Moreover, any error in admitting this evidence was harmless. Because Appellant is complaining about the admission of evidence, the proper standard of review is that for nonconstitutional errors provided in TEX. R. APP. P. 44.2(b), which requires that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." A substantial right is affected when the error had a "substantial and injurious" effect or influence in determining the jury's verdict or when the error leaves one in grave doubt about whether it had such an effect. Montez v. State, 975 S.W.2d 370, 373 (Tex. App.-Dallas 1998, no pet.). "A substantial right is not affected and the error is harmless if, after reviewing the entire record, the appellate court determines that the error did not influence, or had only a slight influence, on the trial outcome." Id. Thus, under Rule 44.2(b), unless the error had a substantial and injurious effect or influence in determining the

verdict, the error will not constitute reversible error. King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

In the instant case, the complained'-of evidence was the location of an elementary school near Keith's Comics, where the comic book in question was sold. However, there was no evidence that any minors bought this comic book or any other obscene comic book from this store. Detective Reynerson testified that the area of the store where this comic book was displayed was marked with a sign saying "No one under 18 allowed past this point." (RR1: 48). Appellant also testified that the adult section of the store was clearly marked and children were not allowed back there. (RR1: 135). In fact, Appellant had stopped a child trying to get back to that section. (RR1: 136). Appellant also testified that he would not sell a violent or adult-theme book to a child. (RR1: 136).

Because there was no testimony that Appellant sold an obscene comic book to a child or even allowed a child into the adult section of the store, evidence that there was a school near the store would have been used by the jury only for the limited purpose of determining contemporary community standards. Therefore, none of Appellant's substantial rights were affected, and any error must be disregarded pursuant to TEX. R. APP. P. 44.2(b). Appellant's point of error is without merit and should be overruled.

RESPONSE TO POINT OF ERROR 7

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DETECTIVE REYNERSON'S TESTIMONY THAT THE COMIC BOOK WAS OBSCENE.

Appellant claims that the court abused its discretion in admitting Detective Reynerson's testimony that "Demon Beast Invasion: The Fallen" was obscene. The State responds that the

testimony was properly admitted as the opinion testimony of a lay witness. Moreover, any error was cured because the same evidence came in elsewhere.

Relevant Facts

During Detective Reynerson's testimony, the trial court twice sustained Appellant's objection that the answer would be a legal conclusion when the detective was asked how he makes an assessment of what is obscene and whether he found anything obscene in the store. (RR1: 30,34). However, Appellant did not object to the following evidence:

> Q. (By [the prosecutor]) Did you find anything that you felt was obscene in the store?
>
> A. Yes.
>
> Q. What was that?
>
> A. It was a comic book.

(RR1: 34). Appellant objected but was overruled regarding the following evidence:

> Q. And in your opinion did this comic book meet the definition of obscenity in your opinion?
>
> [DEFENSE COUNSEL]: Again, Your Honor, I'm going to object again. He's not qualified to give his opinion on this matter.
>
> THE COURT: Overruled.
>
> Q. [Prosecutor]: You may answer the question.

A. Yes.

(RR1: 39-40). Appellant then allowed the following evidence with no objection:

Q. And did you form an opinion as to whether or not this particular comic book would be patently offensively [sic] to the average Texan?

A. Yes.

Q. And what is that opinion?

A. That it was obscene, that it was offensive.

Q. And why?

A. Because of the sexual contact depicted in it.

(RR1: 40). The court then allowed Detective Reynerson, over objection, to state his opinion that the comic book had no literary, scientific, or political value. (RR1: 41-42).

Evidence Was Properly Admitted

A trial court should be allowed the discretion to exclude or admit evidence before the jury, and an appellate court should not set aside the trial court's ruling absent a showing on the record that the trial court abused its discretion by acting in an arbitrary and unreasonable manner. Montgomery, 810 S.W.2d at 379-80. In the instant case, this testimony was admissible under TEX. R. CRIM. EVID. 701, which provides the following:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

This Court has also recognized that "a lay witness may testify in the form of an opinion if the opinion is rationally based on the perception of the witness and helpful to a clear understanding of his testimony." Reid v. State, 749 S.W.2d 903, 907 (Tex. App.-Dallas 1988, pet. ref'd). The ruling in Reid is applicable here, where Detective Reynerson was testifying as a lay witness, not an expert. Detective Reynerson's opinion regarding the obscenity of the comic book was rationally based on his perception and helpful to a determination of a fact in issue regarding whether the comic book was obscene.

Appellant argues that Detective Reynerson was giving expert testimony, but was not qualified as an expert. Appellant is incorrect. The prosecutors indicated before trial that they did not have any expert witnesses. (RR1: 24). The reason the prosecutors did not qualify Detective Reynerson as an expert was because he was not testifying as an expert; he was merely testifying as the officer who purchased and reviewed this particular comic book.

In Austin v. State, 794 S.W.2d 408, 410 (Tex. App.-Austin 1990, pet. ref'd), the Austin Court of Appeals determined that an officer's opinion that "Swedish Deep Muscle Rub" was often a catchphrase for prostitution was admissible as opinion testimony under Rule 701. A similar decision should be made in the instant case.

In Denham v. State, 574 S.W.2d 129, 131 (Tex. Crim. App. 1978), the Court of Criminal Appeals held that a lay witness may

give his opinion regarding things within his common knowledge. Because of Detective Reynerson's experience in the vice division, whether something was obscene was within his common knowledge. Therefore, the detective was properly allowed to give his opinion that the comic book was obscene.

Moreover, any error in admitting Detective Reynerson's opinion that the comic book was obscene was cured because essentially the same evidence came in elsewhere without objection. A potential error in admission of evidence is cured where the same evidence comes in elsewhere without objection. Hudson v. State, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984); Vela v. State, 516 S.W.2d 176, 179 (Tex. Crim. App. 1974). In the instant case, Appellant allowed Detective Reynerson to testify, without objection, that he found a comic book that he felt was obscene in the store. (RR1: 34). Appellant also allowed Detective Reynerson to testify without objection that, in his opinion, this comic book would be patently offensive to the average Texan because it was obscene. Since the same or essentially the same evidence about which Appellant complains came in elsewhere without objection, any error was cured. This point of error is without merit and should be overruled.

RESPONSE TO POINT OF ERROR 8

ANY ERROR CAUSED BY THE COURT REPORTER'S FAILURE TO RECORD THE PUNISHMENT PHASE OF THE TRIAL WAS WAIVED BY APPELLANT'S FAILURE TO OBJECT; MOREOVER, ANY ERROR WAS HARMLESS.

Appellant claims that he was denied due process under the Fifth and Fourteenth Amendments due to the failure to record the punishment hearing. The State responds that any error caused by the

court reporter's failure to record the punishment phase of the trial was waived by Appellant's failure to object. Moreover, any error was harmless because the missing portion of the record is not necessary to a resolution of this appeal.

Relevant Facts

Appellant filed an omnibus pretrial motion requesting that a complete record be made of the trial, including voir dire, all testimony, bench conferences, and argument of counsel. (CR1: 13). Prior to trial, the court asked if defense counsel and the State had agreed on everything in the pretrial motion. (RR1: 22). Defense counsel went through the various areas where agreement had been reached and stated, "No. 8, we asked for a complete record and that's being done." (RR1: 22-23).

At the conclusion of the guilt phase of the trial, the court noted that it had asked for a written report and that sentence would be given later. (RR1: 169). The record then states,. "Punishment hearing not on the record." (RR1: 169). Appellant filed a boilerplate Motion for New Trial alleging only that the verdict was contrary to the law and evidence. (CR1: 40).

Any Error Was Waived

Any error has been waived due to Appellant's failure to object to the lack of a recording of the punishment phase of the trial. TEX R APP P. 33.1(a) provides that, in order to present a complaint for appellate review, the record must show that "the complaint was made to the trial court by a timely request, objection or motion" that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint," and that the court ruled on the request, objection, or motion.

Case law also dictates that the failure to object at trial waives error, if any is even presented. Green v. State, 682 S.W.2d 271, 275 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); Esquivel v. State, 595 S.W.2d 516,522 (Tex. Crim. App. 1980), cert. denied, 449 U.S. 986 (1980). The reason for the contemporaneous objection rule is to inform the trial court of the basis of the objection and give the court or the opposing party an opportunity to correct the error or remove the basis of the objection. Purtell v. State, 761 S.W.2d 360, 365 (Tex. Crim. App. 1988), cert. denied, 490 U.S. 1059 (1989). A defendant "may not, for the first time on appeal, urge error not raised at trial." Nelson v. State, 607 S.W.2d 554, 555 (Tex. Crim. App. 1980).

The waiver rule is applicable even in a case where constitutional error is alleged. In Mendoza v. State, 552 S.W.2d 444, 450 (Tex. Crim. App. 1977), the Court of Criminal Appeals specified that it "has consistently held that in order to complain of denial of federally guaranteed constitutional rights, there must be an objection in the trial court." In Rogers v. State, 640 S.W.2d 248, 264 (Tex. Crim. App. 1982), the Court found that even constitutional error may be waived by failing to object. This same rule has been followed by this Court and other courts of appeals. Cole v. State, 931 S.W.2d 578, 580 (Tex. App.-Dallas 1995, pet. ref'd); Cole v. State, 757 S.W.2d 864, 865 (Tex. App. Texarkana 1988, pet. ref'd).

In the instant case, Appellant did not object to the court reporter's failure to record the punishment phase, and thus did not give the trial court a chance to correct the error. If Appellant had raised the issue at trial, the court could have ordered the court reporter to record the punishment phase of the trial. Appellant also did not raise the recording issue in his Motion for New Trial, nor did he complain of any punishment issues in his Motion for New Trial. (CR1: 40). Instead, Appellant waited until this appeal to

allege that error occurred when the court reporter failed to record the punishment phase. Therefore, Appellant has waived any error.

Any Error Was Harmless

Even if Appellant preserved the error merely by requesting that the entire trial be recorded, any error is harmless. In Isaac v. State, 989 S.W.2d 754, 755 (Tex. Crim. App. 1999), the defendant complained of a missing portion of the record which was caused by the malfunction of the court reporter's recording machine. The missing portion of the record included most of the testimony of one of the prosecution's two witnesses. Id. at 755-56. On appeal, the defendant questioned whether missing portions of the record should result in a new trial without regard to whether the defendant suffered any harm from the absence of portions of the record. Id. at 755. The Court of Criminal Appeals determined that TEX. R. APP. P. 34.6(f) applied to the case. Id. at 756. The Court then stated the following:

> Rule 34.6(f)(3) specifies that a new trial may be granted only if the missing portion of the record "is necessary to the appeal's resolution." That provision is itself a harm analysis. If the missing portion of the record is not necessary to the appeal's resolution, then the loss of that portion of the record is harmless under the rule, and a new trial is not required. In enacting that provision of the rule, we necessarily rejected the contention that a missing record could never be found unnecessary to an appeal's resolution.

Isaac, 989 S.W.2d at 757. The Court of Appeals had already found that the missing portions of the record were unnecessary to the appeal's resolution, and the Court of Criminal Appeals affirmed the opinion of the Court of Appeals. Id. at 757 n.4.

In the instant case, the missing punishment recording is not necessary to a resolution of this appeal. On appeal, Appellant has not alleged any particular error at punishment, but has simply complained about the lack of recording of the punishment phase because it "prevents appellant from establishing the existence of harmful error." (Appellant's brief at 46). In his Motion for New Trial, Appellant also did not allege any error at the punishment phase. Because one of Appellant's appellate attorneys, Paul Shunatona, was also his trial attorney, Appellant could easily have alleged that err or occurred at the punishment phase, if any had occurred. Appellant has not established that the missing portion of the record is necessary to the resolution of his appeal. Therefore, any error in failing to record the punishment phase of the trial was harmless. This point of error is without merit and should be overruled.

PRAYER

The State prays that this Honorable Court will affirm the judgment of the trial court.

Respectfully submitted,

/s/

BILL HILL
Criminal District Attorney
Dallas County, Texas

KAREN R. WISE
Assistant District Attorney
State Bar No. 21810200
Frank Crowley Courts Bldg.
133 N. Industrial Blvd., LB-19
Dallas, Texas 75207-4399
(214) 653-3637
(214) 653-3643 *fax*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief was served on Appellant's attorneys Paul J. Cambria, Jr., and Roger W. Wilcox, Jr., 42 Delaware Avenue, Suite 300, Buffalo, New York 14202, and Paul R. Shunatona, 211 North Record, Suite 450, Dallas, Texas 75202, by depositing same in the United States mail, postage prepaid, on August 8th, 2001.

/s/
KAREN R. WISE

NO. 05-00-01522-CR
IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

JESUS A. CASTILLO, JR.
Appellant,
vs.
THE STATE OF TEXAS,
Appellee.

An Appeal from the County Criminal Court No. 8
Dallas County, Texas
MA99-72739-J

REPLY BRIEF FOR THE APPELLANT

Paul J. Cambria, Jr.
Roger W. Wilcox, Jr.
Attorneys at Law
Admitted Pro Hac Vice
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
Ofc: 716-849-1333
Fax: 716-855-1580

Paul R. Shunatona
Attorney at Law
211 North Record, Suite 450

Dallas, Texas 75202
Ofc: 214-827-7747
Fax: 214-826-4699
SBN 18328400

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INDEX OF AUTHORITIES iii

STATEMENT OF FACTS 1

POINT OF ERROR NUMBER ONE

APPELLANT'S CONVICTION FOR OBSCENITY IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE 2

POINTS OF ERROR NUMBER TWO AND FOUR

THE STATE'S FAILURE TO PRESENT EVIDENCE CONCERNING THE CONTENT AND CHARACTER OF ALL FOUR VOLUMES OF THE "DEMON BEAST INVASION, THE FALLEN" SERIES RENDERS THE EVIDENCE LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION 8

POINT OF ERROR NUMBER THREE

THE STATE'S PROOF IN SUPPORT OF APPELLANT'S CONVICTION FOR OBSCENITY IS NOT FACTUALLY SUFFICIENT 11

POINT OF ERROR NUMBER FIVE

"DEMON BEAST INVASION, THE FALLEN" IS NOT CONSTITUTIONALLY OBSCENE 12

POINT OF ERROR NUMBER SIX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IRRELEVANT AND PREJUDICIAL TESTIMONY CONCERNING THE PROXIMITY OF AN ELEMENTARY SCHOOL TO THE COMIC BOOK STORE 13

POINT OF ERROR NUMBER SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DETECTIVE REYNERSON'S OPINION THAT "DEMON BEAST INVASION, THE FALLEN" IS OBSCENE..... 17

POINT OF ERROR NUMBER EIGHT

APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS BY THE FAILURE TO RECORD THE PUNISHMENT HEARING..... 22

PRAYER 23

CERTIFICATE OF SERVICE 24

INDEX OF AUTHORITIES

Page

Cases

Abor v. State, 677 S.W.2d 560
(Tex. App. - Eastland 1984, pet. ref'd) 5

Barnhart v. State, 648 S.W.2d 696
(Tex. Crim. App. 1983) 5

Carroll v. State, 701 S.W.2d 913
(Tex. Crim. App. 1986) 4, 5, 6

Cohen v. State, 849 S.W.2d 817
(Tex. Crim. App. 1993) 19

Cook v. State, 858 S.W.2d 467
(Tex. Crim. App. 1993) 3

Davis v. State, 658 S.W.2d 572
(Tex. Crim. App. 1983) 2

Duckett v. State, 797 S.W.2d 906
(Tex. Crim. App. 1990) 19

Fairow v. Texas, 943 S.W.2d 895
(Tex. Crim. App. 1997) 20

Goocher v. State, 633 S.W.2d 860
(Tex. Crim. App. 1982) 8, 9, 10

Johnson v. State, 760 S.W.2d 797
(Tex. App. - Dallas 1988, no pet.) 4, 5, 6

Kois v. Wisconsin, 408 U.S. 229,
92 S.Ct. 2245 (1972) 10

Montaz v. State, 975 S.W.2d 370
(Tex. App. - Dallas 1998, no pet.) 16

Montgomery v. State, 810 S.W.2d 372
(Tex. Crim. App. 1990) 13

Rees v. State, 909 S.W.2d 264
(Tex. App. - Austin 1995, pet. ref'd) 10

Reid v. State, 749 S.W.2d 903
(Tex. App.- Dallas 1988, pet. ref'd) 19

Schutz v. State, 957 S.W.2d 52
(Tex. Crim. App. 1997) 19

Speiser v. Randall, 357 U.S. 513,
78 S.Ct. 1332 (1958) 2, 15

Staten v. State, 686 S.W.2d 268
(Tex. App. - Houston 1985, no pet.) 4, 5, 6

Other Authorities

Texas Penal Code Ann. §43.21(a)(1)(A) 13, 14

Texas Penal Code Ann. §43.21(a)(1)(B) 14

Texas Penal Code Ann. §43.21(a)(3) 14

Texas Rule of Criminal Evidence 704 19

Texas Rules of Criminal Evidence 702 19

United States Constitution,
First Amendment 2, 3, 15, 16

V.T.C.A. Penal Code §43.23(a)(1) 8

STATEMENT OF FACTS

Appellant will rely on the Statement of Facts set forth in his initial brief on appeal.

POINT OF ERROR NUMBER ONE
APPELLANT'S CONVICTION FOR OBSCENITY IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

The State contends that, viewing both the prosecution and defense evidence, the proof was legally sufficient to support appellant's conviction of obscenity. Appellant respectfully submits that the nature of the content-based speech restriction at issue demands that the burden of presenting a *prima facie* case that the charged comic book is not within the ambit of First Amendment protection should fall squarely and solely on the shoulders of the prosecution. Irrespective of the quantum of proof evaluated on this appeal, however, the legal insufficiency of the trial evidence is patent.

While obscenity may be proscribed, "all written material . . . is presumptively protected by the First Amendment." Davis v. State, 658 S.W.2d 572, 577 (Tex. Crim. App. 1983). Thus, the Constitution demands the use of "sensitive tools" when attempting to distinguish between legitimate and illegitimate speech. Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342 (1958). Appellant submits that the scope of legal sufficiency review generally applied in criminal cases does not sufficiently protect the constitutional interests implicated by this prosecution.

Where the "protected" status of expression is not at stake in a criminal prosecution, then perhaps it is appropriate to review both the State's and the defendant's evidence in passing upon the propriety of a trial court's denial of a motion for an instructed

verdict. See, Cook v. State, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993) [where the Court explained that it would "consider the evidence presented at trial by both the State and appellant in determining whether there was sufficient evidence . . . ."]. However, when an accused faces a penal sanction for disseminating presumptively protected *speech*, as opposed to engaging in unprotected non-expressive *conduct*, the Government should be held strictly to its burden of proving, on its own case, that the speech at issue is beyond the protection of the First Amendment. Having been put in jeopardy by the State on the basis of the content of the charged material, an individual should remain free to defend his exercise of First Amendment rights without fear of curing a deficiency in the State's case through the presentation of defense evidence.

In light of the foregoing, appellant respectfully submits that the State's case, which consisted only of Detective Reynerson's testimony, was legally insufficient to establish beyond a reasonable doubt that appellant knew the character and content of the comic book purchased by the detective. Here, appellant worked in a comic book store which retailed predominantly non-adult mainstream comics and action hero figurines [R.R. at 32-35]. The store had an area in which no one under the age of eighteen was allowed and from this area Detective Reynerson obtained a copy of "Demon Beast Invasion, the Fallen." The cover of the comic book stated "Absolutely Not for Children" [R.R. at 33-36]. Contrary to the State's representation, the cover does not depict nudity. While nudity may be inferred from the artistic rendering of a female on the cover, the drawing does not depict uncovered female breasts or genitalia [see State's Exhibit 1]. Detective Reynerson handed the comic book face up to appellant when he purchased it [R.R. at 37-38].

The foregoing is the sum of the proof offered on the State's case to establish appellant's knowledge of the content and character

of the charged materials. This evidence is legally insufficient to support conviction and the cases relied upon by the State are easily distinguishable.

First, the State quotes extensively from Johnson v. State, a case discussed in appellant's brief. Johnson v. State, 760 S.W.2d 797, 799 (Tex. App. - Dallas 1988, no pet.). The State's reliance on Johnson is misplaced. Far from being similar to the instant case (as the State claims), the facts of Johnson highlight important differences.

For example, Johnson and other obscenity cases have emphasized the notoriously adult nature of the establishments in question as a persuasive indicator that the accused could not help but know the nature and contents of material in question. Johnson v. State, supra at 800 [business was clearly an adult bookstore]; see also, Carroll v. State, 701 S.W.2d 913 (Tex. Crim. App. 1986) [adult bookstore]; Staten v. State, 686 S.W.2d 268 (Tex. App. - Houston 1985, no pet.) [adult bookstore]. In contrast, appellant worked in a predominantly mainstream comic bookstore with a small section off limits to minors.

Similarly, the overwhelmingly adult-oriented character of the inventory is a significant factor in these decisions. See, Johnson v. State, supra [inventory of store consisted of sexually explicit magazines depicting acts of sexual intercourse on the covers; no general subscription magazines sold]; Carroll v. State, supra [inventory included obscene devices, magazines depicting ultimate sexual acts on their covers, numerous sexually explicit movie stills, signs stating "Hard Core"]; Staten v. State, supra [sexual devices displayed for sale and all magazines in inventory were sexually explicit]. In the instant case, however, the inventory was comprised primarily of general distribution comic books, such as Batman and Superman [R.R. at 32-35].

A third factor often considered probative of a defendant's knowledge of the content and character of purportedly obscene materials is the observable content of the cover. For instance, in Carroll, Johnson, Staten and Glass, the magazines at issue all presented actual sexual conduct on their covers. Moreover, the titles of the magazines often contain sexually explicit references. See, Johnson v. State, supra; Barnhart v. State, 648 S.W.2d 696 (Tex. Crim. App. 1983).

No such circumstances exist in the instant case. The cover of "Demon Beast Invasion, the Fallen" does contain an artist's drawing of an apparently unclad female, but nudity is not depicted [see State's Exhibit 1]. Further, the title of the comic book is not sexually suggestive; rather, it references a science fiction/horror theme [State's Exhibit 1]. Consequently, the case at bar presents circumstances entirely different than those in Abor v. State, 677 S.W.2d 560 (Tex. App. - Eastland 1984, pet. ref'd).

Finally, reviewing courts often consider the accused's degree of contact with the charged material in determining whether the evidence was legally sufficient to establish his knowledge of the content and character of the material. For instance, in Carroll, the proof demonstrated that the defendant himself unpacked magazines with covers depicting ultimate sexual acts, wrapped them in cellophane and heat-sealed the magazines before placing them on the shelves. Carroll v. State, supra at 915. In Staten, the defendant actually advised the undercover police officer that the magazine was good. Staten v. State, supra at 269.

In the case at bar, however, there was no proof that appellant did anything other than simply put the comic book in a bag for Detective Reynerson [R.R. at 37-38]. Unlike Carroll, the jury did not hear anything concerning extensive handling of the comic book by appellant. Furthermore, at no time did appellant ever advise Detective Reynerson concerning the contents of the

comic book or enter into any discussion with him on the subject. Cf., Staten v. State, supra.

Finally, the proof is legally insufficient even if the Court's analysis includes the defense evidence. While appellant did admit seeing the cover of the comic book when he rang up the sale, that cover is clearly not of the sexually explicit kind (showing photographs of ultimate sexual acts) some courts have identified as persuasive proof of a defendant's knowledge of content and character. See, Johnson v. State, supra; Carroll v. State, supra. Additionally, the fact that appellant acknowledged seeing the warning "Absolutely Not For Children" on the cover of the comic book when he cashed Detective Reynerson out adds little to the State's case. As appellant explained, that warning was not exclusive to sexually-oriented titles and could also refer to comic books with violent content [R.R. at 140-41]. In any event, "Demon Beast Invasion, the Fallen" is a far cry from the vulgar, sexually explicit titles involved in the obscenity cases addressed above and such evidence cannot be equated with even a remotely persuasive inference of knowledge of content and character on appellant's part. Accordingly, the trial court erred in denying appellant's motion for an instructed verdict and appellant respectfully requests that this Court issue an order reversing his conviction and enter a judgment of acquittal on the count of obscenity charged in the information.

POINTS OF ERROR NUMBER TWO AND FOUR

THE STATE'S FAILURE TO PRESENT EVIDENCE CONCERNING THE CONTENT AND CHARACTER OF ALL FOUR VOLUMES OF THE "DEMON BEAST INVASION, THE FALLEN" SERIES RENDERS THE EVIDENCE LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION

Relying on Goocher v. State, 633 S.W.2d 860 (Tex. Crim. App. 1982), the State maintains that the evidence supporting appellant's conviction of obscenity is not legally and factually insufficient because the State failed to offer at trial the entire four-volume comic book series of which "Demon Beast Invasion, the Fallen" is but a part. Goocher is readily distinguishable and not controlling on this issue.

In Goocher, a deputy sheriff attended a drive-in theater and watched the movies "Cherry Truckers," "Fulfillment," and an unnamed film. Id. at 861. The officer then obtained arrest and search warrants, which were executed the following day. Defendant Goocher was arrested and the three films were confiscated. Id. at 861-62.

At trial, the jury viewed the two named films, but not the unnamed one. On appeal from her conviction for commercially exhibiting obscene materials under former V.T.C.A. Penal Code §43.23(a)(1), defendant Goocher claimed that the evidence supporting her conviction was insufficient because, since the deputy sheriff had paid a single admission price to view three films, the jury should have considered all three films in determining the obscenity question. The Court of Appeals ultimately ruled that since the State acted within its rights in choosing not to charge Goocher with commercially exhibiting the unnamed film, no error occurred. Id. at 863. Central to the Court's opinion was the fact that, under the circumstances of that case, "Cherry Truckers" and "Fulfillment" stood alone as individual "unit[s] of perception." Id. Notably, no claim was made that either film was related to the third in terms of theme or content.

The differences between Goocher and the case at bar could not be more apparent. Each of the films in Goocher were unrelated, independently existing works. In contrast, "Demon Beast Invasion, the Fallen" is merely the second volume of a thematically linked

four-volume Japanese horror and science fiction series [R.R. at 83-90]. As comic book expert Scott McCloud testified, a storyline is carried forward from Volume 1 through Volume 4. Significantly, in McCloud's opinion, the sexual themes set forth in Volume 2 do not stand alone and are intended to be juxtaposed against the normal, healthy relationships found at the beginning of Volume 1 for the purpose of showing ways in which certain characters have been changed by the alien invasion which is the subject of the series [R.R. at 83-90]. McCloud's testimony was corroborated by Professor Napier, who described the continuing themes of the series in detail and agreed that "Demon Beast Invasion, the Fallen" should be evaluated in the context of the entire series [R.R. at 98-118].

The main issue presented under Points of Error Two and Four is that the jury cannot be considered to have considered the work "as a whole" by virtue of the State's failure to present the other three volumes of the "Demon Beast Invasion" series for the jury's evaluation. This was not an issue addressed in Goocher; therefore, Goocher does not control disposition of the questions presented herein.

Appellant submits that the instant case is more akin to the situation found in Rees v. State, 909 S.W.2d 264 (Tex. App. - Austin 1995, pet. ref'd). In Rees, the defendant was charged with showing the film "Midnight Snack" during a broadcast of "Infosex," a live call-in program on the Austin Community Television Cable access channel. The Third District Court of Appeals rejected the contention that the evidence was insufficient to support conviction because the State did not attempt to prove that the entire "Infosex" program was obscene. Noting that the Supreme Court's opinion in Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245 (1972), "indicates that the work to be taken as a whole should be measured in thematic units and not in physical units," the Court concluded that "Midnight Snack" was a "separate unit of perception" which Rees merely used the "Infosex" program to promote. Rees v. State, supra at 269.

"Demon Beast Invasion, the Fallen," on the other hand, was integrally related to the storyline and thematic content of the entire four-volume series. Appellant, therefore, submits that, in basing its verdict on consideration of only Volume 2, the jury did not consider the work as a whole. Accordingly, appellant's conviction is not supported by legally and factually sufficient evidence. Appellant respectfully requests that this Court reverse his conviction and enter a judgment of acquittal.

POINT OF ERROR NUMBER THREE

THE STATE'S PROOF IN SUPPORT OF APPELLANT'S CONVICTION FOR OBSCENITY IS NOT FACTUALLY SUFFICIENT

Appellant will rely on the arguments set forth in his initial brief on appeal.

POINT OF ERROR NUMBER FIVE

"DEMON BEAST INVASION, THE FALLEN" IS NOT CONSTITUTIONALLY OBSCENE

Appellant will rely on the arguments set forth in his initial brief on appeal.

POINT OF ERROR NUMBER SIX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IRRELEVANT AND PREJUDICIAL TESTIMONY CONCERNING THE PROXIMITY OF AN ELEMENTARY SCHOOL TO THE COMIC BOOK STORE

Contrary to the State's contention, the introduction of testimony that an elementary school was located across the street from Keith's Comics was not only irrelevant, it was also highly prejudicial. The admission of such testimony constituted an abuse of discretion requiring reversal of appellant's conviction. Montgomery v. State, 810 S.W.2d 372 (Tex. Crim. App. 1990).

The State's argument that the proximity of the elementary school to the comic book store is relevant to the contemporary community standards prong of Tex. Penal Code Ann. §43.21(a)(1)(A) is illogical and without support in law. Location in the community plays no part in determining the applicable community standard. Jurors simply are not charged with the duty to evaluate the obscenity of a charged work in light of the location at which it is disseminated. Notably, the State has failed to offer any legal authority in support of its erroneous contention.

Moreover, the State has failed to address appellant's challenge, *inter alia*, that his fair trial rights were prejudiced not only by the introduction of Detective Reynerson's testimony in this regard, but also by the State's improper and inflammatory use of such evidence in argument to the jury. Despite its protestations that the proximity of the elementary school to the comic book store was offered only to somehow assist the jury in determining whether the charged comic book was obscene under prevailing community standards, it is patently obvious that the prosecutor sought to use this testimony to prey upon the fears of the jurors and to inflame them with the unproven suggestion that children were allowed access to these materials. As the prosecutor's summation illustrates, no attempt was made to incorporate the proximity of the elementary school into a community standards analysis. This is not surprising since obscenity is not determined by the location of dissemination. Rather, a work's constitutionally protected status is adjudicated on the basis of (1) whether the average person, applying contemporary community standards, would find that the work taken as a whole

appeals to the prurient interest in sex (Tex. Penal Code Ann. §43.21[a][1][A]) and (2) whether the work contains representations or descriptions which are so offensive on their face that they affront current community standards of decency and can be termed "patently offensive" (Tex. Penal Code Ann. §43.21[a][1][B] and §43.21[a][3]). Nowhere in the statutory definition of obscenity is the location of the exercise of expressive rights mentioned.

The prosecutor's argument to the jury exposes the prejudicial nature of Detective Reynerson's testimony and the prejudicial purpose to which the State put such proof:

> Where is this sold? Where is it sold? This is sold in a comic book store across the street from an elementary school. Across the street from people who are ages 6 through 12. That is where this is sold. Those are the people who have access to this.
>
> . . .
>
> Comic books, traditionally what we think of, are for kids. This is a store directly across from an elementary school and it is put in a medium, in a forum, to directly appeal to kids. *That is why we are here, ladies and gentlemen.* I want to re-emphasize that the fact that all this smut is out there, does not mean it's acceptable and is decent by our community [R.R. at 156; emphasis added].

The State used Detective Reynerson's testimony in an attempt to elicit a condemnatory response from the jury based on the fear that the risk of minors' exposure to sexually explicit materials is increased by the proximity of the school to the comic book store. While this is a concern which might be raised in a zoning context or in a criminal prosecution for illegally selling such materials to

minors, it is wholly irrelevant to the question of whether this comic book is protected by the First Amendment.

Furthermore, under the circumstances the error in the admission of such irrelevant and prejudicial testimony, coupled with the State's improper exploitation of such proof, cannot be deemed harmless. The process of differentiating between legitimate and illegitimate speech requires the use of "sensitive tools." Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332 (1958). Appellant submits that one of these tools is a dispassionate, impartial fact finder charged with the responsibility of deciding the obscenity question on only legitimate grounds. Similarly crucial to this process is the exercise of the prosecutorial function in a fair and non-inflammatory manner. The benefit of these minimal protections was not extended to appellant at trial below.

In determining whether the improper admission and use of the testimony concerning the school's location had a substantial and injurious effect or influence in determining the jury's verdict or leaves one in great doubt whether it had such an effect, Montaz v. State, 975 S.W.2d 370, 373 (Tex. App. - Dallas 1998, no pet.), consideration must be given to the fact that this case is substantially unlike most other obscenity cases. The jury did not hear evidence concerning an adult bookstore disseminating x-rated movies and magazines which have often been the subject of obscenity prosecutions. Rather, this case involves a predominantly non-adult comic book store and a clerk who sold a comic book under circumstances where, *inter alia*, the proof of his knowledge of the content and character of the charged work was limited to his viewing of a non-explicit cover with a title referencing a science fiction/horror theme. Further, the work at issue is an artistic creation with literary and artistic significance, as testified to by two experts (comic book artist and media writer, Scott McCloud, and Professor Susan Napier of the University of Texas). Appellant submits that "Demon Beast Invasion, the Fallen" is not simply on

the periphery of First Amendment protections. Accordingly, the introduction and use of this irrelevant and prejudicial evidence distracted the jury from consideration of legitimate and pertinent issues and encouraged them to convict appellant simply because an elementary school was nearby. At a minimum, one must have great doubt as to the effect of the introduction of this evidence on the jury's verdict. Consequently, appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

POINT OF ERROR NUMBER SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DETECTIVE REYNERSON'S OPINION THAT "DEMON BEAST INVASION, THE FALLEN" IS OBSCENE

Despite the State's concession that Detective Reynerson was not testifying as an expert witness but "merely testifying as the officer who purchased and reviewed this particular comic book" (see Respondent's Brief, p.26), the State presented Detective Reynerson to the jury in such a way as to give the impression that he was in fact testifying as an expert witness. For instance, after establishing that the Detective works for the Vice Section of the Dallas Police Department, the prosecutor asked Detective Reynerson how Vice Department differs from a traffic or routine patrol. Detective Reynerson responded, "We pretty much *specialize* in alcohol violations, prostitution, *obscenity*, gambling" [R.R. at 30; emphasis added]. After eliciting a response that led the jury to believe Detective Reynerson was a specialist in obscenity, the prosecutor continued this theme by repeatedly asking Detective Reynerson his opinion as to whether the comic book in question was obscene. Specifically, at one point the prosecutor asked Detective Reynerson "And in your opinion this comic book is obscene. Why not just make an arrest at that point?" [R.R. at 38]. Defense counsel

immediately objected on the ground that the Detective had not been qualified as an expert witness and on the ground that the issue of obscenity is one of ultimate fact and invades the province of the jury [R.R. at 38]. The trial court sustained counsel's objection, but overruled his request for an instruction that the prosecutor cease this line of questioning [R.R. at 38-39].

While Texas Rule of Criminal Evidence 704 allows testimony in the form of an opinion that embraces an ultimate issue to be decided by a trier of fact, expert testimony must assist the trier of fact to be admissible. [Tex. R. Crim. Evid. 702]. The Texas Court of Criminal Appeals has stated that, "Expert testimony assists the trier of fact when the jury is not qualified to 'the best degree possible' to determine intelligently a particular issue without the help of the testimony. But, the expert testimony must aid -- not supplant -- the jury's decision." Schutz v. State, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997), quoting Duckett v. State, 797 S.W.2d 906, 910 (Tex. Crim. App. 1990), overruled on other grounds, Cohen v. State, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993). Here, Detective Reynerson's testimony was elicited in order to supplant the jury's decision as to whether or not the "Demon Beast Invasion" was obscene, a decision that was within the cavil of the jury.

The State maintains that Detective Reynerson was testifying as a lay witness and cites Reid v. State, 749 S.W.2d 903, 907 (Tex. App.- Dallas 1988, pet. ref'd), for the proposition that "a lay witness may testify in the form of an opinion if the opinion is rationally based on the perception of the witness and helpful to a clear understanding of his testimony." Even if we accept the fact that Detective Reynerson was testifying as a lay witness, it was still error for the trial court to allow Detective Reynerson to testify that in his opinion, "Demon Beast Invasion" is obscene where his testimony was not helpful to the jury.

Scratching the surface of what Texas courts mean when they state that a lay opinion must be helpful to the witness, it is clear that Detective Reynerson's testimony does not fit this description. An opinion by a lay witness is not helpful if the jury is in a position to form its own opinion. Fairow v. Texas, 943 S.W.2d 895, 901 (Tex. Crim. App. 1997) [co-defendant in a murder case testified for the State as an accomplice witness as to whether the defendant intentionally shot the victim]. Here, the jury, upon review of the contents of the comic book could have decided for themselves whether "Demon Beast Invasion" was obscene. As members of the community in which "Demon Beast Invasion" was sold, no one was better situated to decide the ultimate issue of obscenity but the jurors themselves. Thus, it was error to admit Detective Reynerson's opinion testimony that "Demon Beast Invasion" is obscene

.

Finally, the respondents contend that any error in admitting Detective Reynerson's opinion that "Demon Beast Invasion" was obscene was cured because essentially the same evidence came in elsewhere without objection. Respondent directs this Court's attention to page 34 in the record where the following exchange occurred:

Q: Did you find anything you felt was obscene in the store?

A: Yes.

Q: What was that?

A: It was a comic book.

Respondent argues that because trial counsel did not object to this very general question, any error caused by admission -- over trial counsel's objection -- of testimony relating specifically to the

obscenity of "Demon Beast Invasion" was cured. This contention is without merit. Defense counsel did object when questions were addressed to the detective regarding the obscenity of the particular comic book at issue, "Demon Beast Invasion." In fact, when the obscenity of "this comic book" was questioned by the prosecutor on pages 38 and 39 of the record, trial counsel objected both times. The first time he was sustained, the second time, overruled. The fact that trial counsel did not object when the prosecutor directed introductory questions to the detective regarding whether he found anything in the store obscene does not cure the defect caused when the court overruled trial counsel's objection to the detective offering his opinion specifically as to whether "Demon Beast Invasion" was obscene.

In addition, the defect was not cured when Detective Reynerson was allowed to testify without objection that in his opinion, "Demon Beast Invasion" would be patently offensive to the average Texan [R.R. at 40]. At that point, the prosecutor was simply addressing an element of obscenity after the detective had improperly been allowed to give his opinion as to the ultimate issue -- that, in his mind, the comic book was obscene [R.R. at 38-40]. Detective Reynerson having already testified, over objection, that the work met the definition of obscenity, this error was not cured by the absence of an objection to one question concerning a subsidiary element of the obscenity test.

In conclusion, it is respectfully submitted that the State, while not officially classifying Detective Reynerson as an expert witness, held him out to the court and the jury as an expert witness and he was erroneously allowed to supplant the jury's decision on the ultimate issue. Alternatively, as a lay witness, Detective Reynerson was improperly allowed to express his opinion that "Demon Beast Invasion" was obscene when his opinion offered little assistance to jurors well able to decide that issue themselves. Furthermore, the fact that trial counsel failed to object to a general

reference to the obscene nature of items in the store or to a question concerning the patent offensiveness of the comic book at issue did not cure the defect caused when Detective Reynerson was allowed to express his opinion as to the obscene nature of "Demon Beast Invasion."

Appellant respectfully requests that this Court enter an order reversing appellant's conviction and remanding the case for a new trial.

POINT OF ERROR NUMBER EIGHT

APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS BY THE FAILURE TO RECORD THE PUNISHMENT HEARING

Appellant will rely on the arguments set forth in his initial brief on appeal.

PRAYER

For the foregoing reasons and the reasons set forth in appellant's original brief, appellant respectfully prays that the case against him be reversed and a judgment of acquittal be entered by the Court. In the alternative, appellant requests that the case against him be reversed and remanded to the trial court for a new trial *in toto* or for a new punishment hearing.

DATED: September 27, 2001 Respectfully submitted,

By /s/
Roger W. Wilcox, Jr.

Paul J. Cambria, Jr.
Roger W. Wilcox, Jr.
Attorneys at Law
Admitted Pro Hac Vice
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
Ofc: 716-849-1333
Fax: 716-855-1580

Paul R. Shunatona
Attorney at Law
SBN 18328400
211 North Record, Suite 450
Dallas, Texas 75202
Ofc: 214-747-8844
Fax: 214-742-7313

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to Bill Hill, District Attorney for Dallas County, Texas, via United Parcel Service - Next Day Delivery, on September 27, 2001.

/s/
Roger W. Wilcox, Jr.

A-140

Cause No. _____

In the Court of Criminal Appeals for the State of Texas

JESUS A. CASTILLO, JR.,

Petitioner/Appellant,

vs.

THE STATE OF TEXAS,

Respondent/Appellee.

On Petition From a Decision of the Court of
Appeals for the Fifth District of Texas,
at Dallas, Texas in No. MA 99-72739-J

PETITION FOR DISCRETIONARY REVIEW

Attorneys for Petitioner/Appellant

Richard Alan Anderson, Esq.
Of Counsel to
Burleson, Pate & Gibson, LLP
2414 N. Akard, Suite 700
Dallas, Texas 75201
(214) 871-4900

Paul J. Cambria, Jr., Esq.
Roger W. Wilcox, Jr., Esq.
Admitted Pro Hac Vice
Lipsitz, Green, Fahringer,
Roll, Salisbury & Cambria LLP

42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

IDENTITY OF PARTIES

Attorney for Petitioner at Trial:

Paul R. Shunatona
211 North Record, Suite 450
Dallas, Texas 75202
(214) 827-7747
State Bar #18328400

For the State:

Honorable Bill Hill
Elected District Attorney
Rex Anderson
Nancy Ohan
Dallas County District Attorney's Office
Frank Crowley Courts Building
133 North Industrial Boulevard
Dallas, Texas 75207
(214) 653-3600

Attorneys for Petitioner on Appeal:

Paul J. Cambria, Jr.
Roger W. Wilcox, Jr.
Admitted Pro Hac Vice
Lipsitz, Green, Fahringer,
Roll, Salisbury & Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

Paul R. Shunatona
211 North Record, Suite 450
Dallas, Texas 75202
(214) 827-7747
State Bar #18328400

For the State:

Honorable Bill Hill
Elected District Attorney
Karen Wise
Dallas County District Attorney's Office
Frank Crowley Courts Building
133 North Industrial Boulevard
Dallas, Texas 75207
(214) 653-3600

TABLE OF CONTENTS

Page

IDENTITY OF PARTIES i

TABLE OF CONTENTS iii

INDEX OF AUTHORITIES iv

STATEMENT REGARDING ORAL ARGUMENT vii

STATEMENT OF THE CASE viii

STATEMENT OF PROCEDURAL HISTORY ix

GROUNDS FOR REVIEW 1

GROUND FOR REVIEW NUMBER 1 1
REASONS FOR REVIEW 1
ARGUMENTS AND AUTHORITIES 1
A. Standard of Review 1
B. Factual Background 2
C. Argument and Analysis 3

GROUND FOR REVIEW NUMBER 2 6
REASONS FOR REVIEW 6
ARGUMENTS AND AUTHORITIES 6

GROUND FOR REVIEW NUMBER 3 9
REASONS FOR REVIEW 9
ARGUMENTS AND AUTHORITIES 10

GROUND FOR REVIEW NUMBER 4 11
REASONS FOR REVIEW 11
ARGUMENTS AND AUTHORITIES 11

GROUND FOR REVIEW NUMBER 5 13
REASONS FOR REVIEW 13
ARGUMENTS AND AUTHORITIES 13

PRAYER FOR RELIEF 15

INDEX OF AUTHORITIES

	Page
Cases	
Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983)	11, 12
Armitage v. State, 637 S.W.2d 936 (Tex. Crim. App. 1982)	14
Barnhart v. State, 648 S.W.2d 696 (Tex. Crim. App. 1983)	13
Benson v. State, 661 S.W.2d 708 (Tex. Crim. App. 1983)	5
Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978)	5
Carroll v. State, 701 S.W.2d 913 (Tex. Crim. App. 1986)	7, 8
Davis v. State, 658 S.W.2d 572 (Tex. Crim. App. 1983)	4
Draughon v. State, 831 S.W.2d 331 (Tex. Crim. App. 1992)	14
Glass v. State, 761 S.W.2d 806 (Tex. App. - Houston 1988)	8
Griffin v. State, 614 S.W.2d 155 (Tex. Crim. App. 1981)	1
Hernandez v. State, 767 S.W.2d 902 (Tex. App. - Corpus Christi 1989)	14
Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979)	1

Johnson v. State, 760 S.W.2d 797
(Tex. App. - Dallas 1988) 8

Miller v. California, 413 U.S. 15,
93 S.Ct. 2607 (1973)
10, 11 vii,

Rees v. State, 909 S.W.2d 264
(Tex. App. - Austin 1995) 11

Smith v. California, 361 U.S. 147,
80 S.Ct. 215 (1959) 4

Speiser v. Randall, 357 U.S. 513,
78 S.Ct. 1332 (1958) 4

Staten v. State, 686 S.W.2d 268
(Tex. App. - Houston 1985) 8

Other Authorities

Texas Penal Code Ann. §43.21 vii, 10, 11

Texas Penal Code Ann. §43.23 vii, 1, 10, 11

Texas Rules of Appellate Procedure,
Rule 33.1 14

Texas Rules of Appellate Procedure,
Rule 66.3 1, 6, 9, 13

Texas Rules of Appellate Procedure,
Rule 68.2 ix

United States Constitution,
First Amendment vii, 1, 4

A-148

Cause No. _____

In the Court of Criminal Appeals
for the State of Texas

JESUS A. CASTILLO, JR.,

Petitioner/Appellant,

vs.

THE STATE OF TEXAS,

Respondent/Appellee.

On Petition From a Decision of the Court of
Appeals for the Fifth District of Texas,
at Dallas, Texas in No. MA 99-72739-J

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS:

Comes now Jesus A. Castillo, Jr., Petitioner herein and appellant before the Court of Appeals for the Fifth Judicial District sitting in Dallas, Texas, and seeks discretionary review from

this Court from the Opinion affirming his conviction for the offense of obscenity.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner seeks review by this Court of two issues of first impression with significant First Amendment implications. First, Petitioner contends that on appellate review of an obscenity conviction, the First Amendment requires that legal sufficiency of the evidence analysis incorporate only a review of the evidence offered by the State in determining whether the State has met its burden of overcoming the presumption of a challenged work's constitutionality. Second, this Court is asked to determine that Petitioner's First Amendment rights were violated when the jury was permitted to render a verdict without first reviewing the "whole of the material" as required by Texas Penal Law §§ 43.21(a)(1) and 43.23, as well as by the Supreme Court's ruling in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607 (1973).

Additionally, Petitioner seeks a grant of discretionary review from this Court for the purposes of demonstrating that the prosecuted comic book is not constitutionally obscene, that the trial proof did not establish that Petitioner knew the character and content of said comic book, and that the Court of Appeals erred in refusing to consider the merits of Petitioner's complaint that irrelevant and highly prejudicial evidence should not have been admitted by the trial court on the ground that such objection was not preserved at trial.

Petitioner respectfully submits that, in light of the magnitude of the constitutional issues presented, oral argument would assist the Court in deciding questions that are important to Petitioner, the Bench and the Bar.

STATEMENT OF THE CASE

By Information dated September 30, 1999, appellant was charged with the misdemeanor offense of obscenity for the sale of a comic book entitled "Demon Beast Invasion, the Fallen II" on September 22, 1999 [Clerk's Record (hereinafter "C.R.") at 6]. By motion filed April 26, 2000, appellant moved in the Dallas County Criminal Court No. 8 for a determination that the comic book at issue was not obscene [C.R. at 9-10]. Said motion was denied by the Honorable Vickers L. Cunningham, Sr., by order dated August 21, 2000 [C.R. at 11]. Appellant pleaded not guilty to the charge of obscenity and a jury trial commenced on August 21, 2000. The jury rendered a verdict of guilty [Reporter's Record (hereinafter "R.R.") at 168] and on August 28, 2000, appellant was sentenced by the Court to 180 days confinement in the Dallas County Jail, one year probation and a $4,000 fine [C.R. at 38-39]. Appellant's motion for a new trial was denied by the County Court [C.R. at 40]. Appellant's notice of appeal was filed on September 15, 2000 [C.R. at 42]. The Court of Appeals for the Fifth District, Dallas, Texas, affirmed Petitioner's conviction on July 2, 2002 [Appendix A].

STATEMENT OF PROCEDURAL HISTORY

The Court of Appeals for the Fifth District of Texas, Dallas, Texas, in an opinion dated July 2, 2002, No. 05-00-01522-CR, affirmed Petitioner's conviction, with a dissent by the Honorable Tom James. No motion for a rehearing was filed and a petition for discretionary review is timely filed on or before August 1, 2002. Rule 68.2(a), Tex. R. App. Proc.

GROUNDS FOR REVIEW

GROUND FOR REVIEW NUMBER 1

Whether the Court of Appeals employed the correct standard of review in determining whether Petitioner's conviction of obscenity in violation of Texas Penal Code Ann. §43.23(c)(1) is supported by legally sufficient evidence demonstrating that Petitioner knew the content and character of the charged comic book.

REASONS FOR REVIEW

The Court of Appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals. Rule 66.3(b), Tex. R. App. Proc.

The Court of Appeals has committed constitutional error in affirming Petitioner's conviction.

ARGUMENTS AND AUTHORITIES

A. Standard of Review.

On legal sufficiency review, the Court of Criminal Appeals normally examines all of the evidence in the light most favorable to the verdict in order to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See, Griffin v. State, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). However, Petitioner contends that the standard of review traditionally utilized in conduct-based criminal cases is insufficiently protective of free speech rights as guaranteed by the First Amendment to the United States Constitution. Since the State bears the burden of overcoming the presumption that the comic book at issue is constitutionally protected, evidence offered by

Petitioner in defense of his First Amendment rights should not be considered on legal sufficiency review.

B. Factual Background.

Located on East Mockingbird Lane in the City of Dallas, Keith's Comics primarily offered popular and non-sexual comic books, such as Batman, Superman, etc., and mainstream fantasy paraphernalia, such as figurines of action figures and comic book characters, to the general public [R.R. at 32-35]. On September 22, 1999, Dallas Police Detective Craig A. Reynerson visited Keith's Comics "to see if there was any obscenity being sold in the store" [R.R. at 31-33]. He proceeded to the back of the store into an area marked off by a sign which read "No One Under 18 Allowed Past This Point" [R.R. at 33-34, 48]. Certain comic books Detective Reynerson considered adult in nature were displayed on three shelves and he picked out a comic book entitled "Demon Beast Invasion, the Fallen." The cover contained what *appeared to be* a drawing of an unclad female, but did not display female genitals or breasts and did not depict any sexual conduct [R.R. at 34-35, 48; State's Exhibit 1]. The cover also stated "Absolutely Not For Children," but did contain any sexually-oriented references [R.R. at 36; State's Exhibit 1]. Detective Reynerson took "Demon Beast Invasion" to the cash register and handed it, front cover up, to Petitioner, who charged him $3.19 and placed the comic book in a bag [R.R. at 37-38].

Petitioner explained that, as a manager at Keith's Comics for approximately three years, he sold comic books mostly to adults. While the store carried comic books with violent and mature themes, such items were offered for sale only in a small section in the back of the store clearly marked off limits to children [R.R. at 134-136]. Petitioner recalled Detective Reynerson entering Keith's Comics and proceeding directly to the back of the store. Detective Reynerson asked specifically for "Demon Beast" and Petitioner replied that he believed the store had sold out of that title [R.R. at

137]. A few minutes later, the detective approached Petitioner with a book. Petitioner saw the title "Demon Beast" on the cover, but did not open the book up to look inside. He also did not see anything on the cover indicating that the book contained sexual content and did not know what the book contained until it was produced in court during the trial [R.R. at 137-139]. While Petitioner understood that some comic books in the adult section carried a warning stating "not for children" and contained sexually explicit material, that warning was not exclusive to titles containing sexually oriented content and also applied to comic books with violent, but not sexual, themes [R.R. at 140-141].

C. Argument and Analysis.

The State's direct case consisted only of Detective Reynerson's testimony. After the State rested, Petitioner moved for an instructed verdict, contending that the evidence presented was insufficient to establish that petitioner knew the content and character of "Demon Beast Invasion, the Fallen" [R.R. at 60-61]. The motion was denied by the trial court [R.R. at 62-65]. On appeal, Petitioner argued that the Court of Appeals should review only the evidence adduced by the State in determining whether the proof was legally sufficient. The Court of Appeals rejected this contention, noting that Petitioner had cited no law for the proposition [Appendix at p.6].

Given that this is a case of first impression in Texas, the absence of case law directly on point is not surprising. However, the field is not entirely barren of guiding authority supporting the proposition that the legal sufficiency analysis employed by the Court of Appeals violates a defendant's First Amendment rights on appeal of an obscenity conviction. While obscenity may be proscribed, "all written material . . . is presumptively protected by the First Amendment." Davis v. State, 658 S.W.2d 572, 577 (Tex. Crim. App. 1983). Thus, the Constitution demands the use of "sensitive tools" when attempting to distinguish between legitimate

and illegitimate speech. Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342 (1958). Indeed, the legal sufficiency of the State's evidence must be viewed in light of the constitutional dimension of the requirement that the State prove beyond a reasonable doubt that an accused knew the content and the character of the material alleged to be obscene. See, Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959) [where the Supreme Court rejected *per se* liability for the sale of an obscene work on the ground that a scienter element was mandated by the Constitution].

Consequently, Petitioner submits that when an accused faces a penal sanction for disseminating presumptively protected *speech*, as opposed to engaging in unprotected, non-expressive *conduct*, the State should be held strictly to its burden of proving, on its own case, that the speech at issue is beyond the protection of the First Amendment. Having been put in jeopardy by the State on the basis of the content of the charged material, an accused should remain free to defend his exercise of First Amendment rights without fear of curing a deficiency in the State's case through the presentation of defense evidence. Any other standard of review will promote a chilling effect on the vigorous defense of presumably protected speech. Moreover, if the State's case is "so lacking that it should not have even been *submitted* to the jury," see, Benson v. State, 661 S.W.2d 708, 715-16 (Tex. Crim. App. 1983), quoting Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141 (1978) (emphasis in original), the First Amendment minimally requires that the State not be relieved of its burden to prove that the challenged work is outside the ambit of constitutional protection by permitting an obscenity conviction to be affirmed on the basis of a legal sufficiency review considering evidence offered by an accused in defense of his expressive rights after the erroneous denial of a motion for an instructed verdict.

The effect of the Court of Appeals' application of this erroneous review standard was dramatic. Indeed, the Court of Appeals strongly emphasized the evidence put forth during the defense case in rejecting the legal sufficiency challenge:

In arguing the State failed to meet its burden, appellant relies heavily on the fact that Keith's Comics was not an adult bookstore and "did not retail predominantly sexually explicit materials." He argues the comic book's cover did not depict "actual sexual conduct or even graphic nudity," and its title was not vulgar or sexually explicit.

While appellant's assertions are true, the evidence showed that appellant had managed Keith's Comics for two years when he sold the comic book, was familiar with the title, handled the comic book at the time of the sale, knew it was in the store's "adults-only" section, and knew the "adults-only" section contained sexually explicit material. Further, the record reflects the comic book contained a "not for children" warning label, and there was testimony that all the materials in the "adults-only" section contained sexually explicit material. Under these circumstances, we conclude there was legally sufficient circumstantial evidence from which the jury could find appellant had knowledge of the sexually explicit content and character of the comic book. We overrule his first point of error [Appendix at p.7].

It is evident that Petitioner's testimony weighed heavily in the Court of Appeals' determination that the proof presented at trial was sufficient to sustain the conviction. But for the Court's erroneous consideration of Petitioner's testimony, this verdict would not withstand appellate review. Accordingly, Petitioner respectfully submits that the Court of Criminal Appeals should grant discretionary review.

GROUND FOR REVIEW NUMBER 2

Whether the Court of Appeals correctly determined that Petitioner's conviction of obscenity is supported by legally sufficient evidence demonstrating that Petitioner knew the content and character of "Demon Beast Invasion, the Fallen."

REASONS FOR REVIEW

The Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States. Rule 66.3(c), Tex. R. App. Proc.

The Court of Appeals' decision conflicts with another Court of Appeals' decision on the same issue. Rule 66.3(a), Tex. R. App. Proc

The Court of Appeals has erred in overruling Petitioner's point of error challenging the sufficiency of the evidence supporting his conviction for obscenity.

ARGUMENTS AND AUTHORITIES

As described in the factual background detailed in Ground for Review No. 1, Petitioner worked in a *comic book store* which retailed predominantly non-adult, mainstream comics and action hero figurines [R.R. at 32-35]. The store had a small area in which no one under the age of eighteen was allowed and from this area Detective Reynerson obtained a copy of "Demon Beast Invasion, the Fallen." Though the cover of this comic book warns that it is not for children, it does not depict actual nudity. The artistic rendering of the female on the cover does not depict uncovered female breasts or genitalia, or sexual conduct [see R.R. at 32-35; State's Exhibit 1], and the title of the work certainly does not suggest any sexual theme. Detective Reynerson handed the comic book face up to Petitioner when he purchased it [R.R. at 37-38]. This is the sum of the proof offered on the State's case to establish Petitioner's knowledge of the content and character of the charged materials.

This Ground for Review necessarily focuses on what proof the prosecution put before the jury on the issue of scienter besides a non-graphic comic book cover. In those published decisions affirming convictions, in part, on the basis of sufficient proof of an

BEST AVAILABLE COPY

accused's knowledge of the content and character of the materials he sold, scienter was essentially an unavoidable conclusion in light of circumstances strongly indicative of the seller's awareness of the graphic sexual content of the majority of the inventory made available to the public. For example, in Carroll v. State, 701 S.W.2d 913 (Tex. Crim. App. 1986), defendant's conviction was affirmed upon evidence that he worked in an adult bookstore which purveyed apparently obscene devices and magazines whose covers depicted ultimate sexual acts. Id. at 915. The store exhibited numerous signs containing the words "Hard Core" and numerous sexually explicit movie stills labeled "Dirty Movies." Direct testimony was also offered that the defendant in that case himself unpacked the sexually explicit magazines, placed them in a plastic cellophane wrapper and heat-sealed the magazines before placing them on the shelves. Id.; see also, Glass v. State, 761 S.W.2d 806 (Tex. App. - Houston 1988) [magazine cover contained depictions of sexual intercourse; the adult bookstore was named "Hot X Adult Theatre"; the bookstore contained "rows and rows" of adult magazines along each wall and the magazine selected for prosecution had a sexually explicit title]; Johnson v. State, 760 S.W.2d 797 (Tex. App. - Dallas 1988) [the defendant worked in an adult bookstore with a sign stating, "If nudity offends you, do not enter" and an inventory consisting of magazines with sexually explicit covers depicting acts of sexual intercourse or deviant sexual intercourse -- including "F---in' With Soul" magazine, the charged work]; Staten v. State, 686 S.W.2d 268 (Tex. App. - Houston 1985) [similar].

The circumstances presently before this Court could not be more different. Petitioner did not work in an adult bookstore and did not retail predominantly sexually explicit materials. No sexual devices were displayed; only comic books and action hero figurines. The cover of the subject work does not show any graphic sexual content, and the title suggests a non-sexual, horror/science fiction theme.

Finally, the proof is legally insufficient even if this Court's analysis includes the defense evidence. While Petitioner did admit seeing the cover of the comic book when he rang up the sale, that cover is clearly not of the sexually explicit kind some courts have identified as persuasive proof of a defendant's knowledge of content and character. See, Carroll v. State, supra. Additionally, the fact that Petitioner acknowledged seeing the "not for children" warning on the cover of the comic book when he cashed Detective Reynerson out adds little to the State's case. As Petitioner explained, that warning was not exclusive to sexually-oriented titles and could also refer to comic books with violent content [R.R. at 140-41]. In any event, "Demon Beast Invasion, the Fallen" is a far cry from the vulgar, sexually explicit titles involved in the obscenity cases addressed above and such evidence cannot be equated with even a remotely persuasive inference of knowledge of character and content on Petitioner's part.

Indeed, the fatal paucity of the proof presented at trial was addressed in detail by the Honorable Tom James in his dissent [Appendix at 16-20]. Although Justice James' dissent addressed the factual insufficiency of the trial proof, his observations that Petitioner simply could not have known the character and content of the comic book are certainly instructive with respect to the question of legal sufficiency. The evidence upon which Petitioner's conviction is founded is so obviously weak that this Court should grant discretionary review of the Court of Appeals' affirmance.

GROUND FOR REVIEW NUMBER 3

Whether the State's failure to introduce the whole of the work "Demon Beast Invasion, the Fallen" renders the evidence legally insufficient to sustain Petitioner's conviction.

REASONS FOR REVIEW

The Court of Appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals. Rule 66.3(b), Tex. R. App. Proc.

The Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States. Rule 66.3(c), Tex. R. App. Proc.

The Court of Appeals has erred in determining that Petitioner's conviction is supported by legally sufficient evidence.

ARGUMENTS AND AUTHORITIES

Texas Penal Code Ann. §§ 43.21(a)(1) and 43.23 require the trier of fact to consider "the whole of the material" in determining whether the prosecuted work appeals to the prurient interest and lacks serious literary, artistic, political or scientific value. See also, Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973). Here, Petitioner contended on appeal that the State's failure to present the other three volumes of "Demon Beast Invasion, the Fallen" rendered the evidence supporting his conviction legally insufficient. The Court of Appeals rejected this argument, explaining that "[t]he other volumes were not necessary or relevant to the obscenity issue" [Appendix at 10].

The trial proof demonstrated that the charged comic book was only volume 2 of a four-volume series [R.R. at 75-76]. Comic book expert Scott McCloud testified that Volumes 1 through 4 are thematically linked and that the sexual themes set forth in Volume 2 do not stand alone, but are intended to be juxtaposed against the normal, healthy relationships found at the beginning of Volume 1 for the purpose of showing ways in which certain characters have been changed by the alien invasion which is the subject of the series [R.R. at 83-90]. McCloud's testimony was corroborated by Professor Susan Napier, who described the continuing themes of the

series in detail and agreed that "Demon Beast Invasion, the Fallen," Volume 2, should be evaluated in the context of the entire series [R.R. at 98-118].

Having considered only one volume of a four-volume work, the jury cannot be said to have evaluated "the whole of the material." Texas Penal Code Ann. §§ 43.21(a)(1) and 43.23. See, e.g., Rees v. State, 909 S.W.2d 264, 268-69 (Tex. App. - Austin 1995) [explaining that the Supreme Court has indicated that that "the work to be taken as a whole should be measured in thematic units and not in physical units"]. Accordingly, Petitioner respectfully submits that this Court should grant discretionary review to consider this important and undecided constitutional issue.

GROUND FOR REVIEW NUMBER 4

Whether "Demon Beast Invasion, the Fallen" is constitutionally obscene upon independent judicial review.

REASONS FOR REVIEW

The Court of Criminal Appeals and the intermediate appellate courts are required to make an independent determination as to whether the material alleged to be obscene is constitutionally obscene. Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

ARGUMENTS AND AUTHORITIES

Applying the Miller test, the Court of Appeals concluded, on independent review, that "Demon Beast Invasion, the Fallen" is constitutionally obscene. In particular, the Court found that, "[t]hese drawings and comments are patently offensive and neither advocate nor communicate any ideas or opinions concerning serious literary, artistic, political, or scientific values" [Appendix at 11 (citation omitted)]. This determination cannot be sustained.

At trial, Petitioner presented compelling testimony concerning the literary and artistic significance of "Demon Beast Invasion, the Fallen." For instance, comic book expert Scott McCloud explained that the four volumes of the series are a thematic whole containing popular Japanese horror and science fiction themes dealing with the concept of an alien infiltration of earth culture and the conflicts it poses for personal relationships [R.R. at 76-78]. Additionally, Professor Napier described how the series tracked the development of a love relationship between two characters defending the earth against the alien invasion [R.R. at 98-118]. She noted that "Demon Beast Invasion, the Fallen" reflects a Japanese cultural fascination with metamorphosis and strange, bizarre creatures extending back to the fifteenth century, as well as an apocalyptic theme prevalent in this genre in Japan [R.R. at 102-103]. Further, in Professor Napier's opinion, the comic book contained "extraordinary scenes that are really quite beautifully drawn," substantiating the serious artistic value of the work [R.R. at 114-116]. Finally, Professor Napier explained that the comic book had political value insofar as it addressed issues of powerlessness [R.R. at 114-116].

In light of the foregoing, it is quite apparent that "Demon Beast Invasion, the Fallen" communicates ideas and opinions concerning issues of serious literary, artistic, political and scientific value. See, Andrews v. State, supra at 384. The work's presentation of skillful, creative artwork and *bona fide* literary and historical themes are readily distinguishable from the base explicit photographic portrayals of actual sexual conduct often confronted by this Court, Id; see also, Barnhart v. State, 648 S.W.2d 696 (Tex. Crim. App. 1983), and readily available within Dallas County and the State of Texas [R.R. at 119-29; Defense Exhibits 2-6]. Consequently, Petitioner respectfully requests that this Court grant discretionary review to consider the obscenity *vel non* of "Demon Beast Invasion, the Fallen."

GROUND FOR REVIEW NUMBER 5

Whether the admission of irrelevant and highly prejudicial testimony concerning the proximity of an elementary school to the comic book store deprived Petitioner of a fair trial.

REASONS FOR REVIEW

The Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals. Rule 66.3(c), Tex. R. App. Proc.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for exercise of the Court of Criminal Appeals' power of supervision. Rule 66.3(f), Tex. R. App. Proc.

ARGUMENTS AND AUTHORITIES

Prior to trial, Petitioner moved *in limine* for an order precluding the State from making any reference to the fact that Keith's Comics was in close proximity to an elementary school. Defense counsel maintained that such evidence was irrelevant and that its probative value, if any, was outweighed by its prejudicial effect [R.R. at 6-7]. Applying Tex. R. Evid. "403.404(b)", the trial court ruled that the State would be allowed to offer testimony concerning the location of Keith's Comics vis-à-vis the school because, curiously, it related to determination of the community standard [R.R. at 7]. On appeal, the Court of Appeals refused to address the merits of Petitioner's argument, ruling instead that Petitioner's counsel had failed to preserve the claim for review because he did not object when the evidence was ultimately offered [Appendix at 12].

The Court of Appeals has ruled in error. Petitioner's motion *in limine* met the requisites of Rule 33.1(a) of the Texas

Rules of Appellate Procedure. Moreover, though motions *in limine* generally do not preserve an objection for appellate review because the circumstances of the later admission of the disputed proof at trial may have differed from the facts considered by the trial court on the motion *in limine*, see, e.g., Armitage v. State, 637 S.W.2d 936, 938 (Tex. Crim. App. 1982), that is not the situation in the instant case. Here, the facts alleged in support of Petitioner's motion *in limine* and the argument had thereon addressed the exact circumstances of the proof at trial. Thus, in ruling on the motion *in limine* the trial court rendered a decision informed by the facts which were ultimately adduced at trial, obviating the need for further objection. See, Draughon v. State, 831 S.W.2d 331 (Tex. Crim. App. 1992); Hernandez v. State, 767 S.W.2d 902 (Tex. App. - Corpus Christi 1989). Accordingly, the Court of Appeals erred in finding Petitioner's point of error unpreserved and this Court should, therefore, reverse the decision of the Court of Appeals and remand this case for consideration of the merits of Petitioner's claim that the trial court abused its discretion in admitting irrelevant and highly prejudicial testimony.

PRAYER FOR RELIEF

Upon review of this Petition, this Court should grant discretionary review, and after briefing and argument reverse the Court of Appeals Opinion and, as deemed appropriate, enter a judgment of acquittal or, in the alternative, either remand the case to the trial court for a new trial *in toto* or remand the case to the Court of Appeals for further proceedings consistent with this Court's judgment.

DATED: August 1, 2002

Respectfully submitted,

PAUL J. CAMBRIA, JR.
ROGER W. WILCOX, JR.
LIPSITZ, GREEN, ,
FAHRINGER, ROLL,
SALISBURY &
CAMBRIA LLP
42 Delaware Avenue
Suite 300
Buffalo, New York 14202
(716) 849-1333 *telephone*
(716) 855-1580 facsimile
Admitted Pro Hac Vice

RICHARD A. ANDERSON
Of Counsel to:
BURLESON, PATE
& GIBSON, LLP
2414 N. Akard, Suite 700
Dallas, Texas 75201
(214) 871-4900 *telephone*
(214) 871-0718 *facsimile*
State Bar No. 01207700

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing was delivered to Honorable Bill Hill, Elected District Attorney for Dallas County, Dallas County District Attorney's Office, Frank Crowley Courts Building, 133 North Industrial Boulevard, Dallas, Texas 75207, and the Office of the State Prosecuting Attorney, Matthew Paul, 202 Price Daniel, Sr. Building, 209 West 14th Street, P.O. Box 12405, Capitol Station, Austin, Texas 78711, on the 1st day of August, 2002, via United States Mail.

RICHARD A. ANDERSON